JD-120-04
Ottawa, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

THI OF COLUMBUS, INC.
d/b/a AUTUMN COURT

and Case No. 8-CA-34334

SEIU DISTRICT 1199 WKO,
THE HEALTHCARE AND SOCIAL
SERVICE WORKERS UNION, AFL-CIO

Steven Wilson, Esq., for the General Counsel.
Angela L. Thomas, Esq., for the Respondent.

DECISION

GEORGE ALEMÁN, Administrative Law Judge. Pursuant to an unfair labor practice charge filed by SEIU District 1199 WKO, the Healthcare and Social Service Workers Union, AFL-CIO (the Union) on June 13, 2003,[1] and amended on July 17, August 20, and October 29, the Regional Director for Region 8 of the National Labor Relations Board (the Board), on November 26, issued a Complaint and Notice of Hearing alleging that THI of Columbus, Inc., d/b/a Autumn Court (herein the Respondent or "Autumn Court") had engaged in certain unlawful conduct in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). In a timely-filed answer to the complaint dated December 10, the Respondent denied having engaged in any unlawful conduct.

A hearing on the matter was held in Ottawa, Ohio from March 1 to March 3, 2004, at which all parties were afforded a full and fair opportunity to call and examine witnesses, to present oral and written evidence, to argue orally on the record, and to file post-hearing briefs. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent is a Delaware corporation with an office and place of business in Ottawa, Ohio, where it is engaged in the business of providing long term nursing care. The Respondent's annual gross revenues exceeds $100,000. Further, the Respondent annually purchases and receives at its Ottawa, Ohio facility goods valued in excess of $2000 directly from points outside the State of Ohio. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates are in 2003, unless otherwise indicated.

II. Alleged Unfair Labor Practices

A. The allegations

The complaint alleges that the Respondent violated Section 8(a)(1) by maintaining and enforcing a work rule prohibiting employees from wearing "buttons, hats, pins, or other types of unprofessional or unauthorized insignia that might represent any political, economic or industrial organization," and Section 8(a)(3) and (1) by suspending employees Natalie Butler and Shawn Eagleson for refusing to remove Union buttons from their persons, by placing employee Arlene Okuley on a 30-day work improvement program, and by issuing a warning to and suspending Eagleson on July 11, and thereafter discharging him on July 15, for his union activities and to discourage other employees from engaging in similar conduct.

B. Factual background

The Respondent, as noted, operates a long-term care facility, i.e., nursing home, in Omaha, Ohio. Its managerial staff consists of administrator Kelli Garrison, Director of Nursing (DON) Sherrie McCluer, Charge Nurse Diane Basinger, and business office manager Catherine Beery, all of whom are admitted supervisors and agents of the Respondent within the meaning of Section 2(11) and 2(13) of the Act. McCluer reports directly to Garrison, and is in charge of the nurses at the facility who in, turn, are in charge of the State-tested nursing assistants or STNAs.[2] (418). There are approximately 60 employees employed at the facility.

Garrison and McCluer began working for the Respondent in their above-described capacities early in 2003. Garrison described herself as a corporate administrator for Respondent's parent company, THI of Columbus, and testified that she travels to wherever the corporation feels she is most needed. In She testified that in early 2003, she was assigned to the Autumn Court nursing home to straighten up the facility and to fix various problems that, among other things, included a high turnover rate, and a failure by Respondent's staff to follow supervisory directives. According to Garrison, "the staff [were] basically doing what they wanted to do, when they wanted to do it; ignoring authority; not doing their jobs." Garrison claims that prior to her arrival at Autumn Court, employees ran the facility, and that her attempts to make employees more accountable were not well-received by employees. (Tr. 343-345).

In the Spring of 2003, the Union began an organizing campaign among Respondent's nonprofessional employees, including STNAs, which culminated in an election held on May 2, which the Union won, leading to its certification as the employees' exclusive collective bargaining representative. Alleged discriminatees Butler and Okuley both played an active role in that campaign. Butler, a 5-year employee at Autumn Court, testified, without contradiction, that she attended every meeting and rally held by the Union, and was outspoken about her prounion views. Okuley similarly testified, also without contradiction, to attending Union meetings, and to signing a Union card. Both Butler and Okuley also were part of the Union's negotiating committee. Alleged discriminatee Eagleson is Butler's son. He also testified, without contradiction, to having attended Union meetings and to signing a Union authorization card. Prior to April 30, Butler and Eagleson also wore Union and other types of buttons to work. One such

[2] STNAs generally help residents at the nursing home with their activities of daily living, which include providing showers, brushing teeth, combing hair, turning patients in bed and, when required, insuring that TAB alarms are properly secured to the resident. The tab alarms are designed to alert the nursing home staff when a resident patient with ambulatory problems attempts to leave his/her bed so that the staff can provide the resident with necessary assistance, thereby preventing injury.

button, for example, measuring just over 2" in diameter containing the words, "Freedom Over Fear," was worn by them and other union supporters for some three to four weeks prior to April 30.

Butler testified that prior to April 30, no one from management ever complained to her about wearing buttons. In fact, she recalled Garrison complimenting her one day prior to April 30, on the "Freedom Over Fear" button, and asking Butler where she got it (Tr. 271). Garrison was not asked to confirm or deny Butler's above assertion. She admitted, however, seeing an employee wearing a button on April 28, but did not identify the employee in question. She further admits she did not ask the employee in question to remove the button. Butler claims McCluer also saw her wearing buttons several days prior to April 30, but did not complain about the buttons or ask her to remove them. McCluer, however, testified that from the time she began her employment with the Respondent in January, through April 28, she never saw any employee wearing buttons on their uniforms, but had observed employees wearing the "Freedom Over Fear" button being on their coats and outer garments. -I credit Butler and find that she, Eagleson, and other employees had been wearing buttons on their uniforms for days, if not weeks, prior to April 30, and that both Garrison and McCluer observed such activity and neither objected or took action to stop it.

McCluer admitted knowing of Butler's, Okuley's, and Eagleson's involvement with the Union. (Tr. 31; 66-67). She also testified that the Union was discussed, but in a general sense, at managers' meetings held some 3-4 times a week. She contends that topics discussed at these meetings regarding the Union related to when the election would be held, and how the facility would be changed with the arrival of the Union. McCluer denied that there was any discussion or mention made at these meetings of particular individual employees who supported or were otherwise connected with the Union, asserting that any such discussion would have been a breach of confidentiality. Garrison similarly admitted that the Union had been the subject of discussions during her department managers' meetings, and likewise denied that any discussion occurred at these meetings about individual supporters or nonsupporters of the Union (Tr. 381).

McCluer's and Garrison's denial that individual employees were never discussed in connection with the Union during their management meetings was contradicted by former employee, Eileen Schroeder. Schroeder began working for the Respondent in May 2001 as a licensed practical nurse (LPN) until October 2002, when she transferred to the Social Service and Restorative Department. She held that position until November 2003. She testified, without contradiction, that in the latter position, she attended department head meetings, along with the office manager, the activity director, and the maintenance supervisor, which were held every morning, and which were usually chaired by Garrison and, in Garrison's absence, by McCluer. Schroeder admits being fully aware of the Union's organizational campaign during the Spring of 2003, and of the Union's election that was held on May 2.

Schroeder testified that the Union was discussed at "almost every [department head] meeting" she attended. She contends, however, that the focus of said discussions centered on McCluer's need to know "who instigated the union coming in," and who they, e.g., those in attendance at the meetings, "thought was responsible for it." According to Schroeder, on more than one occasion before as well as after the May 2, election, McCluer, at these meetings, expressed her belief that Butler and Okuley were the ones primarily responsible for the Union getting in, and that the union would probably "fizzle out" if Butler and Okuley were not at the Respondent's facility. Schroeder further recalled that on several occasions at these meetings, beginning approximately one week before Eagleson's July 15, termination, McCluer commented

that "if they could maybe get rid of Shawn [Eagleson], then Natalie [Butler] would probably quit." (Tr. 219-221). She claims that again, approximately a week and half before Eagleson was terminated, McCluer told her that Eagleson was a poor performer and that she, Schroeder, along with other staff members, should write up Eagleson for anything they saw him do. Schroeder she received no similar directives regarding any other STNA. She testified, however, that she had work with Eagleson before and, in her opinion, found no problem with his work performance.

I credit Schroeder over McCluer and Garrison. From my observation of their demeanor as witnesses, I found Schroeder to be the more persuasive of the three, and am convinced she testified in an honest and forthright manner regarding what she heard and observed at these staff meetings. McCluer and Garrison, on the other hand, were anything but convincing. Both, Garrison more so than McCluer, came across as somewhat arrogant and cocky and willing to say anything to bolster their testimony. As more fully shown below, their testimony was at times vague and too general to be worthy of any serious consideration. In short, I credit Schroeder's more reliable testimony and find that, in addition to generally discussing the Union at these meetings, McCluer at these meetings also blamed Butler and Okuley for the Union's arrival on the scene and discussed ways of retaliating against Butler, and possibly getting her to resign, by taking action against her son, Eagleson.

Regarding the wearing of buttons at the workplace, the Respondent, as noted, maintains a dress code policy that bans as "unacceptable" the wearing of "buttons, hats, pins, or other types of unprofessional or unauthorized insignia that might represent any political, economic, or industrial organization."[3] On April 30, two days before the Union election, Butler and Eagleson received one-day suspensions for refusing to remove all buttons, including the Union's "YES" button, from their uniform.

Eagleson described the events leading up to the April 30, suspensions as follows. On April 30, he arrived for work in the morning wearing two buttons. As the morning progressed, he began receiving additional buttons from other employees which he put on and which, at one point, numbered around 12. Several hours later, McCluer approached him and Butler, who was wearing two buttons at the time, and told them that if they did not remove their buttons, they would be written up. Eagleson recalls McCluer saying that the buttons were not allowed under the policy contained in the Company's handbook. Butler, according to Eagleson, told McCluer to give her the write-up because she was not removing her buttons. (Tr. 157-158)

A short while later, Eagleson and Butler were instructed to go to the front office where they met with Garrison and Joy Dingess, Respondent's Regional Director of Operations. Once there, Eagleson and Butler were directed to remove all their buttons or to go home. According to Eagleson, Butler was wearing only two buttons at the time, e.g., the "Freedom Over Fear" button and the "YES" button with the Union's name in small letters (see GCX-4). Eagleson's testimony on how many buttons he had on prior to going to the office was somewhat confusing and ambiguous. He initially stated that, at the time, he was wearing approximately 12 buttons. He subsequently stated on cross-examination that he was only wearing two buttons when told by Garrison to remove them, but subsequently stated, somewhat confusingly, that he only had an

[3] See, GCX-2, second page, third bullet item under "Unacceptable". The dress code policy, on its face, does not prohibit employees from wearing of buttons or other insignia of a non-political, non-economic, non-industrial nature.

"X" across his chest. [4] (Tr. 159). Eagleson claims he had been wearing the "YES" button for several days prior to April 30, and the "Freedom Over Fear" button for several weeks prior to that date. Both he and Butler declined to remove their buttons, at which point Garrison asked them to leave the premises, which they did. Eagleson testified that when he returned to work the next day, McCluer met with employees and told them that anyone caught wearing buttons could face termination. Eagleson did not wear any more buttons to work during the week following his return from suspension.

Butler's recollection of this incident is that, on April 30, she was wearing the two buttons identified in GCX-4, just as she had been doing for several days prior thereto, when she was approached by McCluer during her break and told she was going to be asked to remove her buttons. Butler asked McCluer what would happen if she refused, and McCluer responded that she would be written up. Butler replied that she would be willing to take the write-up. On returning from break, Butler again was approached by McCluer and told to remove the buttons or she would be written up. Butler reiterated that she would accept the write-up.

Butler contends that, a short while later, she and Eagleson were paged and told to go to the front office. Once there, Garrison directed them to remove their buttons. Butler responded that she did not know why they had to remove their buttons, and mentioned that she had been wearing the "Freedom Over Fear" button for several weeks already, and the "YES" button for several days. According to Butler, she and Eagleson were not told why they were not permitted to wear buttons. She claims that Garrison simply insisted that the buttons had to be removed or they would have to leave the premises. She and Eagleson refused to do so and, as a result, were escorted off the premises. Butler contends that the following day, McCluer met with employees and instructed them that they were not allowed to wear buttons and that employees caught wearing buttons could be terminated.

McCluer recalled that on April 30, she saw Butler, Eagleson, and "most all of the employees in the bargaining unit" wearing numerous buttons on various parts of their person and clothing, e.g., shirts, pants, shoes, hair, etc. She explained that she was not concerned with the message(s) on the buttons, but rather with the fact that the buttons could pose a safety hazard for the facility's residents because the type of pin used on the back of the buttons "could poke the residents or they could fall out." (Tr. 74). She explained in this regard that while Butler and Eagleson were wearing numerous buttons on April 30, they would have been in violation of the dress code even if they had worn only one button. McCluer claims that one cognitively-impaired resident, Beth Shoemaker, was indeed found with a button affixed to her clothing, conduct which she contends was improper. According to McCluer, on April 30, Butler, as well as Eagleson, were "very plastered" with buttons on their clothing. She recalls that on more than one occasion that day, she asked Eagleson to remove his buttons, and that, while he did remove and give her some of his buttons he was wearing the first time she approached him, when she next saw Eagleson he was wearing between 2-5 buttons.

As stated, the language in the Respondent's dress code policy, on its face, prohibits only the wearing of specific buttons, e.g., those containing messages of a political, economic, or industrial nature, and, except for this stated proscription, does not otherwise expressly ban or

[4] Eagleson's testimony as to how many buttons he was wearing when called to the office is somewhat confusing. For example, on direct examination by the General Counsel, Eagleson stated that he was wearing approximately 12 buttons when told by Garrison to remove them. However, on cross-examination, he stated that he was wearing only two buttons when he was first asked to remove them and that, when asked a second time, he only had an "X" across his chest. (Tr. 158; 212).

restrict the number or type of buttons that employees may wear. Although found nowhere in the language of the dress code policy, McCluer nevertheless testified that the dress code policy also bans, for safety reasons, the use of buttons having a pin-type fastener of the kind found in GCX-4, but does not proscribe buttons having other types of fasteners, such as a clip-on mechanism. McCluer makes no claim in her testimony of having inspected the buttons worn by Butler or Eagleson on April 30 to determine whether the fastening mechanism on said buttons was of the pin-type variety, which she contends were prohibited under the dress code policy, or had clip-on attaching mechanisms, which, in her view, would have been acceptable.

McCluer's testimony as to what happened next was somewhat ambiguous. Thus, she testified that twice on April 30, she asked Butler and Eagleson to remove their buttons and that, when they refused to do so, and after learning that a button was found on resident Shoemaker, she summoned them to the front office where she gave them the option of removing their buttons or clocking out and going home (Tr. 76).[5] Elsewhere in her testimony, however, she testified that Garrison, not her, sent them home (Tr. 27). McCluer, however, had no knowledge of just how many buttons Butler and Eagleson were wearing when called to the office. As to whether she met with employees and told them they could be fired if caught wearing buttons, as testified to by Butler and Eagleson, McCluer simply could not recall whether or not she did so (Tr. 28). Accordingly, I credit Butler and Eagleson and find that McCluer did indeed threaten to discharge employees if they persisted in wearing buttons to work.

Garrison's testimony on the button-related suspensions is that, on April 30, she noticed Butler, Garrison and other employees,[6] wearing a large number of buttons on their persons. She recalled that the day before, e.g., April 29, she also saw employees wearing buttons, but not in the large quantities that were worn on April 30. Asked what concerned her about the buttons being worn on April 30, Garrison replied that it was the large quantity of buttons being worn, adding that while the wearing of buttons violated the dress code policy, she would not have had such a concern if the buttons worn had been fewer in number.[7] (Tr. 373).

On seeing employees wearing the buttons, Garrison claims she instructed her department managers to go out and ask the employees to remove their buttons. She contends that while most employees complied with the request, McCluer later reported that Butler and Eagleson were refusing to do so. Garrison claims that also on April 30, she received the report about a button being found on resident Shoemaker. On learning of this incident, and of Butler's and Eagleson's refusal to remove their buttons, she and Dingess summoned Butler and Eagleson to the front office.

When they arrived at the front office, Butler and Eagleson were still wearing buttons, the latter, according to Garrison, had more than ten buttons on his person, the former between 8-10 buttons. Garrison claims that she and Dingess told them the buttons violated Respondent's dress code policy and would have to be removed. She and Dingess purportedly told them that "it was not acceptable to have that many buttons on them while working with the residents." Butler and

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[5] McCluer could not recall if the meeting was held in Garrison's or her own office.

[6] Garrison identified employees Kathy Gallagher, Betty Burger, and Christy Smith as also wearing buttons that day.

[7] Garrison testified that if the employees had been wearing just one button, she would not have been forced to review the Company handbook to determine what the policy was regarding the wearing of buttons, but that having done so, she learned that the wearing of buttons is not an acceptable practice, and consequently, would have instructed employees to remove their buttons whether it involved one or many buttons.

Eagleson, however, refused to do so. Garrison purportedly repeated her request, and Butler and Eagleson again refused, opting instead to clock out and go home. Garrison proceeded to escort both employees towards the exit. As they were leaving, Eagleson, according to Garrison, became very loud. She could not, however, recall what in particular Eagleson may have said. As to Butler, Garrison did not recall her saying anything on her way out. (Tr. 379-380). Butler's and Eagleson's suspensions lasted one day.

Garrison admits that at the meeting with Butler and Eagleson, neither she nor Dingess mentioned the safety concerns raised by McCluer in her testimony as a reason for their insistence that Butler and Eagleson remove their buttons. She explained that it was the quantity of buttons they were wearing that day that she found unacceptable and that, in her view, violated the dress code policy. She further noted that while the button's design could be a safety concern, "it wasn't a primary concern that we brought to their attention." Garrison testified that her greatest concern that day was the fact that a button had been found on resident Shoemaker. Garrison, however, admitted that she did not know if Shoemaker asked for the button that was found on her, or whether the button had a pin or a clip-on type mechanism. There is no evidence to show, nor does the Respondent contend, that Butler and/or Eagleson had anything to do with the button found on resident Shoemaker. At some point after Butler and Eagleson were suspended, a statement describing the events of April 30, signed by Garrison, but which Garrison contends was actually written by Dingess, was prepared (see RX-46). Dingess did not testify.[8]

[8] Several factors lead me to question Garrison's account and to reject RX-46 as unreliable. First, it is unclear if Dingess prepared the document of her own volition, or whether she was asked by Garrison to prepare it on the latter's behalf. Garrison was vague on this point, testifying only that she watched Dingess prepare it, reviewed it after it was completed, and then signed it to show her agreement with its contents. She never claimed to have asked Dingess to do so. It is also unclear from the contents of RX-46 whether the alleged preparer of said document, Dingess according to Garrison, is describing Garrison's or her own observations and actions as to the events of April 30. By way of example, the first sentence of the third paragraph in RX-48 states that "I approached Shawn Eagleson to remove his [buttons]." Given that Garrison's signature is the only one found on RX-46, one might be inclined to conclude that Garrison is the speaker and the one narrating the events. Yet, other statements in the document, e.g., "The DON then came to Kelli [Garrison] and <u>me</u>…" (see the start of paragraph 4 of RX-46) and "<u>Kelli and I</u> followed them…" (see last sentence of RX-46), apparently made by the preparer of RX-46 (presumably Dingess) undermine any such conclusion. It is not clear, for example, if, starting with the third paragraph and elsewhere in the document, the person doing the narration and identified only by the personal pronoun "I", is Garrison or Dingess, although the above "Garrison and <u>me</u>" and "Kelli and <u>I</u>" phrases strongly point to Dingess as the narrator. If, indeed, Dingess in RX-46 is describing her own activities in connection with the April 30, buttons incident, then it would appear that she, and not Garrison, had the greater role in the suspension for it would suggest that Dingess, not Garrison, is the one who instructed Eagleson to remove his buttons, who purportedly directed McCluer to summon Eagleson and Butler to the front office, who purportedly told the latter that their buttons contravened company policy, and who told them they would have to remove the buttons or go home. However, as previously discussed, both Eagleson's and Butler's testimony point to Garrison as the one responsible at the meeting for demanding that they remove their buttons and who sent them home following their refusal to comply. At best, I find RX-46 to be ambiguous and confusing. Dingess, the one who allegedly prepared RX-46 and who could have explained its contents and removed any lingering doubts as to its authencity, was not called to testify, leading me to conclude that had she been called, she would not have corroborated McCluer's testimony regarding its preparation and contents.

I credit Butler and Eagleson over Garrison and find that Butler was only wearing two buttons when called to the front office by Garrison and that it was Garrison and/or Dingess who instructed them to remove their buttons or be sent home. I further credit their claim that, except for being told that the wearing of buttons was prohibited by Company policy, Butler and Eagleson were never specifically told either by Garrison, or earlier by McCluer, why the buttons were prohibited.

Alleged discriminatee Okuley, as previously noted, was also a Union supporter. On or around May 14, an incident occurred between Okuley and McCluer regarding staff nurse, Mindy Butler (M. Butler). That day, according to Okuley, as she and a fellow co-worker were assisting a resident in room No. 10, M. Butler paged them seeking assistance for another resident in room No. 4. M. Butler, Okuley claims, paged three times, but she, Okuley, heard only the last two pages and not the first. When Okuley arrived at room No. 4, another co-worker commented that M. Butler had deliberately paged a third time "just to make sure McCluer heard it." A short while later, McCluer appeared and told them she was there to help Okuley and the co-worker. Okuley then complained to McCluer about what she perceived to be M. Butler's harrassing conduct, and remarked to McCluer that "if [M. Butler] don't knock her shit off, I will be the first to file a grievance against her when the contract goes through." McCluer, according to Okuley, did not respond but instead threw her hands up in the air as if to say that she did not want to hear what Okuley had to say about M. Butler. (Tr. 241-242).

McCluer's version of this incident is that she overheard Okuley say, "I will get Mindy," which she interpreted as a threat, and that she told Okuley the remark was inappropriate. McCluer could not identify when she overheard Okuley make the remark. She also vacillated somewhat on whether she asked Okuley to explain her remark. Thus, she initially claimed that on hearing the remark, she asked Okuley what she meant by it. However, she subsequently admitted that she did not do so right away, but instead questioned Okuley about the remark in a later conversation held in her office.[9] McCluer had no recollection of when she heard the "I will get Mindy" remark, when the subsequent conversation with Okuley occurred, or whether anyone else was present during the second conversation.

McCluer contends that in this subsequent conversation, she asked Okuley to explain her remark and that Okuley replied that what she meant was that she planned on filing grievances against M. Butler. McCluer, at one point, admitted that she took Okuley's comment to mean that Okuley was thinking of filing a grievance with the Union over something M. Butler had done. Yet, she seemed to contradict herself when, on examination by Respondent's counsel, she stated that she did not think Okuley was referring to a "Union grievance charge." McCluer, it should be noted, could not recall when this second conversation with Okuley took place, or whether anyone other than Okuley was with her in the office at the time. (Tr. 37-38).

McCluer testified that she found Okuley's "I will get Mindy" remark to be inappropriate, notwithstanding Okuley's assertion that it referred to the filing of grievances because, in her view, the remark was made in a "threatening manner." She explained that Okuley's remark would have been more acceptable to her had Okuley, for example, simply looked at her and said, "do you

[9] Given McCluer's admission that she did not bother to ask Okuley what she meant by her "I will get Mindy" remark, it is difficult to understand, nor did McCluer explain, why she found Okuley's alleged remark to be "inappropriate," for assuming, arguendo, that Okuley indeed uttered the statement, the remark is subject to any number of interpretations, including an innocent, non-threatening one.

realize we can file grievances if they're going to harass us?" It was Okuley's "threatening tone of voice" which, according to McCluer, rendered the remark inappropriate and led her to caution Okuley about making threats towards other staff members. McCluer, in any event, claims she did not believe Okuley's explanation that she was making reference to the filing of grievances. (Tr. 38; 136). Okuley, as noted, denied making the "I will get Mindy" comment attributed to her by McCluer. As to the subsequent meeting McCluer purportedly had with Okuley during which Okuley explained her "I will get Mindy" remark, Okuley was never questioned about it. However, when she denied making the "I will get Mindy" remark, Okuley implicitly denied having a second conversation with McCluer on the subject as there would have been no reason for Okuley to explain a remark she contends was never uttered by her.

McCluer's rather vague and at times inconsistent testimony regarding this particular incident was not convincing. Okuley's version, on the other hand, was more precise as to time and place, and simply made more sense. Thus, I credit Okuley and find that she never made the "I will get Mindy" remark attributed to her by McCluer. Rather, I am convinced that, during this one conversation between McCluer and Okuley, the latter complained to McCluer about what she perceived to be some harassment by M. Butler, and remarked to McCluer that once they obtained a Union contract, she would be the first to file a grievance against M. Butler. I also find, as credibly testified by Okuley, that McCluer never stated that the remark was inappropriate but rather simply threw up her hands and walked away.

On May 21, one week after the above incident, Okuley was summoned to McCluer's office and handed a "30-day Work Improvement Plan," purportedly to correct some problems she allegedly was having with her work performance. (See GCX-5). McCluer and Garrison were present at that meeting. The work improvement plan cited several deficiencies in Okuley's work performance that allegedly needed remedying, including (1) an unacceptable attitude with staff members; (2) not responding to direct orders from nurses (e.g., not turning in shower sheets on time, answering nurse-aide pages, giving a shower, etc.); (3) threatening certain staff members and creating a hostile environment for the staff; and (4) not following the break policy, and when asked to clock in/out, not complying with the work order. Okuley claims that when given the plan, neither McCluer nor Garrison cited any specific examples of how her conduct was deficient in the four areas described in the plan. Nor did she ask McCluer or Garrison why she was being put on a 30-day improvement plan, explaining that she simply assumed it was because of the remark she made a week earlier to McCluer about filing a grievance against M. Butler. Okuley did recall asking at the meeting what would happen if she did something wrong during the 30-day period, and McCluer responding that it would be cause for termination. (Tr. 248). McCluer did not deny saying this to Okuley, stating only that she could not recall making the comment. Garrison had a similar lapse in memory, testifying that she did not recall Okuley being told at the meeting that she faced possible termination if her performance did not improve, but did acknowledge that termination was indeed an option. Other than what was stated on the performance report, neither McCluer or Garrison, according to Okuley, gave her any specific instructions as to what was expected of her during the 30-day performance period.

Garrison testified that she and McCluer first had an "in depth" discussion between themselves on whether to issue a work improvement plan, and then contacted and discussed the matter with Respondent's corporate Human Resources department (herein CHR) because, she

ontends, they are required to do so "with each H.R. issue that arises in the building."[10] Garrison gave conflicting testimony on whether she and McCluer talked about putting Okuley on a work improvement plan or taking some other disciplinary measure. Thus, when first asked if she recalled any such discussion taking place, Garrison stated she did not. Yet, when asked moments later if she considered issuing Okuley some other form of discipline, Garrison replied, "We discussed it." (Tr. 350-351). McCluer, however, made no mention in her testimony of having an "in depth" discussion with Garrison prior to meeting with Okuley, as claimed by Garrison, or of discussing with Garrison whether some other form of disciplinary measure should be taken against Okuley. Given the lack of corroboration from McCluer, and her own inconsistent statements, Garrison's claim of having had an "in depth" discussion with McCluer on whether to issue a work improvement plan vs. some other form of discipline to Okuley is found not to be credible. Further undermining Garrison's testimony in this regard is her, and McCluer's, assertion that decisions on the type of discipline that should be issued to an employee is made not by them but rather by CHR.

Both Garrison and McCluer testified that the decision to issue the work improvement plan was based on all the factors listed in the work improvement plan. According to McCluer, she would not have necessarily issued the plan if Okuley had been deficient in only one of the above areas. McCluer and Garrison contend that each of the deficiencies described in the plan was reviewed with Okuley on May 21. McCluer recalls telling Okuley she expected improvement in all the areas cited.

McCluer was questioned by the General Counsel on each of the alleged deficiencies cited in Okuley's work improvement plan. As to item No. 1, Okuley's "unacceptable attitude," McCluer explained that the genesis for this write-up was her belief that Okuley "very frequently argued with anyone in charge." She explained that she had personally observed Okuley arguing with others, and had similar run-ins with Okuley herself. As to her own personal experiences with Okuley, McCluer could not recall the specifics regarding any of these incidents, and testified only that they involved "a disagreement between the two of us about her attitude specifically." Asked to be more specific, McCluer could only describe the incidents as involving discussions about Okuley's "unacceptable attitude and disrespect." She recalls telling Okuley only that "her attitude was inappropriate" without giving her any specifics, and that Okuley responded, "I know it is." McCluer could not recall what triggered this latter discussion, and recalls only that it occurred in a hallway. Nor could she recall when, prior to May 21, this or any of the other alleged incidents occurred. She admits that other than these verbal communications she had with Okuley, the latter never received any written disciplinary write-ups for her alleged "unacceptable attitude." (Tr. 33-35). Okuley denied that McCluer ever spoke to her at any time prior to May 21, about an "unacceptable attitude," or admitting to McCluer to having an "inappropriate attitude." (Tr. 243).

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[10] Throughout the hearing, both McCluer and Garrison took the position that most, if not all, disciplinary decisions were made by the CHR department. Asked who at CHR is responsible for making such decisions, McCluer could not identify anyone in particular, stating that the "person changes frequently." More incredibly, McCluer was unable to identify where CHR was located, acknowledging only that it was not at the Autumn Court facility. Thus, when asked where CHR's offices and employees were located, she evasively and without explanation replied, "That's not a cut and dry answer." Nor could she confirm whether or not the disciplinary actions or decisions made by CHR were memorialized in writing, stating only that she believes they would have done so (Tr. 577). McCluer testified that prior to CHR making a decision on whether or not to take disciplinary action against an employee, she faxes all relevant documents in the employee's file to CHR after which she and Garrison consult with someone at CHR regarding the specifics in the file. She admitted, however, she had no way of knowing how CHR arrives at a particular disciplinary decision. (Tr. 579).

Regarding Okuley's alleged "attitude" problem, Garrison explained that she felt Okuley had a "poor attitude" based on her own personal observations of Okuley. These observations, she contends, occurred on three to five different occasions, although she could not recall over what period of time these observations may have taken place. Asked to describe what she observed about Okuley's attitude, Garrison on direct examination by Respondent's counsel described Okuley as being "negative," "grumbling to herself," "conversing with other employees in a very derogatory manner," or not smiling enough. Garrison contends she "would see and observe [Okuley's] attitude in whether she was talking to another staff member or to a nurse, that she either didn't want to be doing what she was doing, or arguing with someone or simply having a bad attitude about working." (Tr. 346; 355-356). Asked to explain the sense in which she found Okuley's "attitude" to be negative, Garrison replied, "I can't tell you specifically what she said but I could hear her tone," which she described as "nasty" and "unfriendly." Regarding Okuley's infrequent smiling, Garrison stated that when Okuley looked at her directly, "it was a very unhappy disgruntled employee look that I would say I got." At one point during cross-examination by the General Counsel, Garrison, in response to whether she viewed Okuley's complaint to co-workers about working conditions to be indicative of a bad attitude, replied that in Okuley's case, it did, and that such complaints were one of the things she had observed. Apparently realizing the significance of her testimony, Garrison retracted her claim that Okuley's discussion of working conditions with other employees reflected a poor attitude, stating that she had made a "mistake" in so asserting. (Tr. 398).

Despite claiming to have personally observed Okuley's poor attitude at the work place, and stating that she expected employees, including Okuley, to be pleasant with staff members, resident patients, and visitors to the facility, Garrison never spoke to Okuley about her "poor attitude" or called it to her attention. She insists, however, that she instructed McCluer to speak to Okuley about her "attitude" problem and that McCluer did so. (399). Garrison was not present when McCluer purportedly spoke to Okuley about her "attitude" problem, nor did she know when McCluer had this alleged conversation with Okuley. Garrision also did not recall if McCluer reported back to her about speaking to Okuley. (Tr. 400). For her part, McCluer made no mention of being asked by Garrison to speak to Okuley about the latter's alleged "attitude problem." While McCluer claims to have spoken to Okuley on one specific occasion about her "unacceptable attitude," as previously indicated, she had no recollection of what precipitated that discussion, and gave no indication that she did so pursuant to instructions from Garrison. Garrison's testimony regarding her observation of Okuley's poor attitude, and of asking McCluer to discuss the matter with Okuley is rejected as not credible. This latter part of her testimony, as noted, was not corroborated by McCluer, and her remaining testimony was too vague and ambiguous to be worthy of belief. Moreover, McCluer's own inability to recall what precipitated her alleged discussion of Okuley's "unacceptable attitude" renders her testimony in this regard just as vague. Okuley, as noted, denied that McCluer ever spoke to her about her attitude prior to May 21. I credit Okuley and find that McCluer's assertion of having spoken to Okuley about her poor attitude prior to May 21, was, like Garrison's assertion, a pure fabrication.

The deficiencies listed in item No. 2, e.g., not responding to nurses' orders, were, according to McCluer, based on reports she received from nurses M. Butler, Jackie Garcia, Diane Basinger, and Dave Tucker, and her own personal observations. One incident involved an alleged refusal by Okuley to comply with M. Butler's request that she turn in her shower sheets one-half hour before the end of the shift. McCluer contends that Okuley admitted refusing to comply with M. Butler's request with the explanation that the shower sheets were supposed to go to nurse Tucker, not M. Butler. McCluer purportedly told Okuley that M. Butler was within her right to ask for the shower sheets, explaining in this regard that all charge nurses share their administrative responsibilities, making it proper for M. Butler to request the shower

sheets from Okuley. According to McCluer, Okuley continued complaining about turning in the shower sheets at which point she directed Okuley to turn the shower sheets in to her.

Regarding the alleged deficiencies cited in item No. 2 of the work improvement plan, McCluer testified that she personally observed Okuley leave her shift without giving a patient a shower, despite being instructed to do so one hour prior to the end of her shift. Her specific testimony in this regard is that she "knew of an incident" when Okuley was asked "to give a resident a shower" and that, after asking McCluer if she had to complete the assignment and being told by the latter that she had to, Okuley simply "left her shift without doing the shower." McCluer did not identify the nurse or other individual who instructed Okuley to give the shower, the date on which this particular incident occurred, or the patient involved. McCluer also claimed to have personally observed Okuley ignoring pages sent to her from the nurses' station, but provided no specifics as to when said observation occurred, or identify the individual(s) who purportedly had paged Okuley. Nor was McCluer able to say how long the above-described conduct by Okuley had been going on prior to May 21. Despite these alleged deficiencies in Okuley's work performance, McCluer admitted that, prior to May 21, Okuley was never disciplined for refusing to shower a patient or to respond to pages. No evidence of complaints from nurse aides, nurses, or other individuals regarding Okuley's failure to respond to calls was produced by the Respondent to substantiate McCluer's claim that Okuley had been ignoring pages. As to the shower sheets, neither M. Butler nor Jackie Garcia was called to corroborate McCluer's claim of having received complaints from them about Okuley's failure to turn in shower sheets or to do so in a timely manner, and while Basinger and Tucker did testify as to other matters, neither was asked to confirm or deny McCluer's assertion that they too complained to her about Okuley's refusal to turn in shower sheets or to otherwise obey their orders.

Okuley did recall that an issue regarding the submission of shower sheets came up prior to May 21. The problem, she contends, arose when M. Butler insisted that Okuley and other employees turn in their shower sheets by 10:00 am to her. Okuley explained that this created a problem for her and other STNAs because resident patients often were not all showered by 10:00 am, and that, consequently, she and other employees usually would not complete their paperwork, including filling out the shower sheets, until 2:00 pm. She testified that other nurses, unlike M. Butler, allowed her to turn in the shower sheets when she got them done. Okuley claims that this particular problem with M. Butler involving the shower sheets was discussed with McCluer, and that the latter told her she could turn in the shower sheets at 2:00 pm. Although she contends that she thereafter began turning in her shower sheets at around 2:00 pm, she testified that at some point following that discussion with McCluer, the practice was modified to have the shower sheets turned between 12:45-1:30 pm so that the resident patients could be placed in bed by 2:00 pm. According to Okuley, she and others have been turning in their shower sheets regularly around that time, and no complaints have been lodged against her for not turning in the shower sheets at 10:00 am, as M. Butler had purportedly insisted on. McCluer's assertion that Okuley refused to give a resident patient a shower after being instructed to do so was denied by Okuley. (Tr. 244-245).

I credit Okuley's denial that she left the facility without showering a patient after being told McCluer that she had to do so. First, there is no question that Okuley's alleged failure to provide a resident with a shower, after purportedly being asked to do so presumably by a nurse and subsequently by McCluer, would have constituted insubordination and a dereliction of duty requiring, at a minimum, some form of discipline, e.g., a write-up, warning, suspension, etc. Yet, Okuley, by McCluer's own admission, was never punished or written up for her alleged misconduct. Nor did McCluer identify the nurse or other individual who purportedly instructed

Okuley to bathe the patient. McCluer likewise did not identify the affected patient nor the date on which this particular incident occurred.

The work deficiency cited in item No. 2, Okuley's alleged failure to respond to pages from nurse aides, is likewise devoid of evidentiary support and based solely on McCluer's dubious, uncorroborated testimony. The Respondent did not identify, nor call as a witness, any nurse aide whose pages were not responded to by Okuley, or who could have confirmed McCluer's account of having observed Okuley ignoring pages from other nurse aides. McCluer's vague and unsupported claim of having witnessed Okuley ignoring pages from nurse aides is, like other aspects of her testimony, simply not credible. Nor do I find convincing McCluer's claim that nurses M. Butler, Garcia, Basinger, and Tucker complained to her about Okuley not turning in shower sheets for, as noted, neither M. Butler nor Garcia was called to corroborate her claim, and Basinger and Tucker, who did testify, were not asked about, and likewise offered no corroboration for, McCluer's claim of receiving complaints from them. Indeed, the Respondent's failure to question Basinger or Tucker on this particular matter warrants an adverse inference that had they been questioned, neither Basinger nor Tucker would have supported McCluer's claim. *McGaw Of Puerto Rico, Inc.*, 322 NLRB 438, 447 (1996); *Lucky 7 Limousine*, 312 NLRB 770, 814 (1993). I therefore credit Okuley's version of events regarding the shower sheet incident with M. Butler, and find that the matter was eventually resolved when McCluer agreed to let Okuley and the other STNAs turn in their shower sheets at a later time.

Item No. 3 of the work improvement plan, as noted, accuses Okuley of making threats against certain staff members and "creating a hostile environment for the staff." Although it claims "threats" had been directed by Okuley at "certain staff members," the only threat mentioned by McCluer to substantiate this particular "problem" was the "I will get Mindy" remark she purportedly overheard Okuley make. Okuley, however, credibly denied making the remark, and admitted only saying to McCluer, one week before she was issued the 30-day work improvement plan, that she would be the first to file a grievance against M. Butler once a Union contract was finalized. As employees have a Section 7 right to file grievances, Okuley's comment to McCluer about filing a grievance against M. Butler once a contract was signed was clearly protected by the Act. *Exxon Mobil Corporation*, 343 NLRB No. 44 (2004); *Saint Luke's Hospital*, 312 NLRB 425 (1993); *Hamburg Industries*, 271 NLRB 683 1984); *Caterpillar Tractor Company*, 242 NLRB 523, 530 (1979). McCluer's apparent attempt to get around the protected nature of Okuley's remark by suggesting that it was the manner or "tone" in which Okuley made her remark, and presumably not the actual comment itself, which she found threatening and objectionable, is simply not credible. Rather, it is patently clear, and I so find, that the issuance of the 30-day work improvement plan was motivated, at least in part, by Okuley's expression of intent to file a grievance, conduct which, as found above, enjoys the Act's protection.

Item No. 4 in the work improvement plan essentially faulted Okuley for not complying with a requirement instituted on or about May 5, that employees clock in and out when taking their breaks. McCluer explained that the clocking in and out rule during breaks was put into effect because the Respondent was having problems with employees, including Okuley, abusing their break privilege. She acknowledged, however, that in the days and weeks after the rule was instituted, Okuley was not alone in failing to clock in and out during breaks and that other employees were continuing to engage in the same conduct. She further conceded that not all those employees who, like Okuley, had failed to comply with the rule were subjected to a 30-day work improvement plan. McCluer also admitted that Okuley at some point remedied this problem to the point where it no longer was not a concern for management. (Tr. 40-41). McCluer did not say when Okuley's compliance with the clocking in and out rule ceased to be a problem.

Okuley testified, without contradiction, that the clocking in and out rule was instituted just a few days after the Board's election, and that the Respondent had no such requirement prior

thereto. She admits that for the first two weeks after the policy went into effect, she, along with other employees, typically forgot to clock in and out, but would do so on realizing their error. She further explained that another reason why she and others did not immediately begin to clock in and out was because Butler had advised them that she was going to consult with the Union regarding the policy. After being advised by the Union to adhere to the policy, Okuley began doing so on a regular basis. She testified, again without contradiction, that she had been complying with the policy for some time prior to May 21. (Tr. 247-248).

I credit Okuley's testimony and find that while she, along with other employees, had been neglectful in adhering to the new clocking in and out requirement imposed by the Respondent soon after the Board's election, she eventually began adhering to the policy and was already in compliance by the time she received her work improvement plan on May 21. Other than Okuley, there is no evidence to suggest, and the Respondent does not contend, that other employees who, like Okuley, had not complied with the timeclock requirement during the brief period of time prior to May 21, were put on work improvement plans or received some other form of discipline.

Okuley testified that during the 30-day performance period, she received no feedback from McCluer or anyone else regarding the progress she was making with respect to the items listed on the performance plan. At the end of the 30-day period, e.g., on June 25, McCluer met with and handed Okuley a document stating that she had shown a "significant improvement in [her] attitude" and had generally shown improvement during the 30-day period (see GCX-6). Okuley testified that her attitude did not change in any way during the 30-day period. (Tr. 250).

McCluer, however, insists that during the 30-day period, Okuley's attitude improved in that she "became pleasant, cooperative, and compliant with what staff asked her to do." (Tr. 44). She claims that Okuley's change of attitude became apparent to her through the interactions she had with Okuley during that period, and from positive reports she received from nurses M. Butler, Garcia, Basinger, and Tucker, the same nurses who purportedly complained about Okuley.[11] McCluer contends that the decision to issue the June 25, follow-up assessment to Okuley was made by her and Garrison.

Garrison recalls having such a discussion with Garrison and that they decided to give McCluer the June 25, letter after consulting with the CHR. According to Garrison, during the improvement period between May 21, and June 25, McCluer discussed with Okuley the improvements she was showing in her attitude and other areas described in the May 21, work improvement plan. This latter claim by Garrison is rejected as without merit as it is inconsistent with McCluer's and Okuley's testimony. Thus, McCluer made no mention in her testimony of having had any such discussions with Okuley during the 30-day period. Rather, she testified only that she "observed" an improvement in Okuley's attitude during the 30-day period, and further stated that she held no meetings with Okuley to discuss her change of attitude. (Tr. 44). McCluer's latter assertion is consistent with Okuley's own claim that she received no feedback from anyone during her 30-day performance period. Further, McCluer made no mention of having consulted with CHR before issuing the June 25, memo to Okuley, as asserted by Garrison.

[11] As with the complaints about Okuley which McCluer claims she received from nurses Basinger and Tucker before issuing the May 21, performance improvement plan, neither Basinger nor Tucker was asked to corroborate McCluer's further claim that, during Okuley's 30-day performance improvement period, they reported seeing changes in Okuley's attitude or work performance.

Regarding alleged discriminatee Eagleson, the record shows that Eagleson had two periods of employment with the Respondent. Thus, he was first employed as a STNA from July 18, 1999 through June 2002, when he voluntarily resigned. He was then rehired in the same capacity by the Respondent on December 2002 and terminated on July 15, allegedly for an "unsatisfactory work performance." (See, RX-9). Eagleson, as noted, is the son of alleged discriminatee Butler and, like Butler, was at all times prior to his discharge an open Union supporter. On April 2, Eagleson was issued a written warning for violating the Respondent's rule against employees smoking in the residents' smoking room. The warning cautioned Eagleson that this was a "final written warning" and that any further recurrence could result in termination. (RX-5).

McCluer testified that following the April 2, warning, she continued receiving complaints about Eagleson's conduct and work performance from employees and staff nurses. Thus, she claims that in early May, Okuley and employee Laura Giesege came to her office to complain that Eagleson and Butler had been using other employees' timecards to clock in and out during their breaks, but that, when she asked them to write down their complaint, they refused to do so for fear that Eagleson and Butler might find out and retaliate against them. McCluer contends that after Okuley and Giesege left her office, she decided to write down what Okuley and Giesege had told her because she wanted to develop some sort of documentation for herself given that the conduct in question was a violation of Company policy. Her written statement of what Okuley and Giesege purportedly reported to her was received into evidence as GCX-12.[12] After preparing her report, McCluer asked Business Office Manager Beery, who purportedly was present when Okuley and Giesege spoke with McCluer, to sign the report as a witness to what had occurred (Tr. 558). She contends she then consulted with Garrison over the report and thereafter faxed it to CHR with a recommendation that some disciplinary action be taken. CHR, however, declined her request because it was of the view that "one statement from a witness hearing it" was not enough to warrant discipline. (Tr. 561).

Beery testified that she was in the main office with McCluer on May 6, when Okuley and Giesege came in and complained to McCluer about seeing Eagleson "use someone else's timecard to clock them in or clock them out" or "clocking people in when they were still out on break or at lunch time." (Tr. 533-534). She claimed that the statements in GCX-12 accurately reflect what was said at that May 6, meeting.[13] Beery, like McCluer, testified that when McCluer asked Okuley and Giesege to put their complaint in writing, the latter declined to do so for fear that Butler might retaliate against them if she found out. (Tr. 533). Beery contends that soon after Okuley and Giesege left, McCluer prepared GCX-12 and asked her to sign her name as a witness to what occurred.

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[12] GCX-12 states that "[o]n May 6th, Arlene Okuley and Laura Geisge [sic] verbally admitted to knowledge of Shawn Eagleson and Natalie Butler using other employees time cards to punch in and out for their breaks. Arlene and Laura also admit knowledge of Shawn tearing up Mindy Butler's time card on one occasion (although the time card had not been used yet, he reportedly was bragging about it). Arlene and Laura are not willing to put this statement in writing for fear of retaliation if Shawn and Natalie found out they wrote statement."

[13] Beery's claim that GCX-12 accurately reflects the complaint purportedly lodged by Okuley and Giesege with McCluer against Eagleson is not consistent with what she testified to before being asked at the hearing to identify and read GCX-12. Thus, prior to being handed GX-12 to identify and read, Beery testified that the complaint by these two involved Eagleson's conduct in clocking in and out for other employees who were still on break. Her testimony in this regard was therefore inconsistent with McCluer's assertion, and the statements in GCX-12, that the nature of the complaint was that Eagleson and Okuley both had been using other employees' timecards to clock in and out during their own breaks.

Okuley and Giesege, sisters both, denied ever complaining to McCluer about the alleged misconduct attributed to Eagleson by McCluer in her May 6, written statement. Okuley recalled only one time after the Board's election when McCluer questioned her about the use of timecards. She explained that this occurred in a resident's room, not in the main office, and that it began by McCluer entering the room and questioning her on who had been "punching in and out on other people's timecards." Okuley explained to McCluer that it was not her, and suggested that McCluer review her timecard to confirm that she, Okuley, was punching in and out properly. McCluer, she recalled, responded, "Yes, I know," and then asked if Okuley would confirm her assumption if she, McCluer, were to say who she thought was doing it. Okuley replied that she simply didn't know. (Tr. 257).

Okuley did recall one occasion, again after the Board's election, when she and Giesege were called into McCluer's office and asked to provide a written statement regarding Eagleson's work performance which, she believed, dealt with the latter's failure to give patients' showers. According to Okuley, McCluer questioned her on whether Eagleson was doing his showers, and she responded that, as far as she knew, he was. Okuley claims that McCluer was not satisfied with her answer and remained intent on getting Okuley to provide her with a contrary statement, which Okuley refused to do. (Tr. 257-259).

Giesege confirmed that she and Okuley visited McCluer's office on May 6, but insisted that they went there only to complain about Eagleson not doing his showers. Like Okuley, Giesege denied telling McCluer at this meeting that she knew Eagleson and Butler were using other people's timecards to punch in and out during their breaks, knowing that Eagleson had torn up M. Butler's time card, or refusing to give McCluer a written statement for fear of retaliation from Eagleson and Butler. She also denied being asked by McCluer to put her complaint about Eagleson in writing, although she did admit that McCluer often asked employees who came to her with complaints to put them in writing. Giesege asserted in her testimony that the statements contained in GCX-12 are false. (Tr. 615-618).

I credit Giesege and Okuley over McCluer and Beery and find that the former did not, as claimed by McCluer in GCX-12 and in her testimony, complain to her about Eagleson clocking in and out using other employees' timecards. Giesege was a particularly credible witness. During her testimony, Giesege wept and was visibly shaken. When questioned by the judge as to why she was so distraught, Giesege confessed that she was nervous and felt intimidated by the process and by the presence of a certain individual or individuals in the courtroom. In her closing remarks, Respondent's counsel sought to lay the blame for Giesege's nervousness and feeling of intimidation on the witnesses who testified for the General Counsel. However, when Giesege was testifying, none of the General Counsel's witnesses were present in the courtroom. By contrast, both McCluer and Garrison, Giesege's superiors and the ones with full authority over her employment status, were sitting in the courtroom. I am convinced, given Giesege's testimony that it was an individual or individuals in the courtroom which intimidated and made her nervous, that it was McCluer's and Garrison's presence which caused her concern. Giesege's willingness to testify against the Respondent's and her own self-interest (Giesege was still employed by the Respondent at the time), despite feeling intimidated by McCluer and Garrison, renders her testimony particularly reliable and trustworthy. Both McCluer and Beery, on the other hand, had inconsistencies in their testimony regarding RX-32 rendering their testimony unworthy of belief. In sum, given Giesege's and Okuley's credible denial of the statements attributed to them in GCX-12, I am convinced that said document was fabricated by McCluer in attempt to build a case against Eagleson. Okuley's credited testimony that McCluer asked her to provide a false statement about Eagleson not doing his showers lends support to such a conclusion.

McCluer further testified that nurse M. Butler also complained to her on several occasions about Eagleson's work performance but refused to put the complaints in writing. Because of M. Butler's reluctance to put her complaints in writing, McCluer contends that she went ahead and jotted down on paper all the complaints M. Butler had related to her. The document prepared by McCluer and purporting to show the nature of M. Butler's complaints reported by the latter to McCluer, lists nine deficiencies in Eagleson's work performance. McCluer contends she prepared the document on May 16. She did not, however, explain when the alleged deficiencies listed therein were reported to her by M. Butler. While received into evidence as RX-27 over the General Counsel's objection, The document is, I find, purely self-serving, untrustworty and unreliable. While there is disputing that McCluer prepared the document, McCluer's overall lack of credibility in other areas, renders this particular document highly suspect. The one person who could have corroborated McCluer's claim that the contents of RX-27 accurately reflect complaints received from M. Butler about Eagleson was M. Butler herself. For whatever reason, the Respondent chose not to call M. Butler to testify about this and other matters relating to other allegations in the complaint. Accordingly, I give RX-27 no weight. Indeed, I am inclined to believe that, like GCX-12, RX-27 may very well have been fabricated by McCluer in her effort to build a case against Eagleson.

In addition to the above complaints regarding Eagleson, McCluer testified that she often had to counsel Eagleson regarding his work performance, but admits that, except for the above smoking warning, she never actually disciplined him for his performance. She contends, however, that Eagleson's performance deteriorated after being moved from second to the first shift. McCluer could not recall when that move from second to first shift occurred.

On May 19, McCluer received from nurse Myers a report detailing some deficiencies in Eagleson's performance which Myers claimed she observed during the preceding weekend, May 17-18 (see RX-28). The report accused Eagleson of failing to turn patient Wendell over every two hours as required, or doing so improperly, failing to provide oral care to another patient, and not giving patients their required showers. Myers, who began working with Eagleson in April after becoming licensed as a charge nurse, testified that she had been having problems with Eagleson's work since she began working with him in April but had never before complained in writing to McCluer about his performance. (Tr. 439).

Beery, who purportedly served as manager of the facility during the weekend of May 17-18, testified that while making her rounds, she noticed that patient Wendell had not been turned during the occasions she went by his room, and questioned Myers about it. She claims that Myers then asked Eagleson if he had done so, and Eagleson answered that he had. Myers, according to Beery, then instructed Eagleson to place a pillow under the patient to improve circulation, and that Eagleson replied, he was going to lunch and would get to it when he got back. Eagleson denied that Myers ever had to remind him to turn patients over, and denied failing to provide oral care to them when needed.

McCluer recalls receiving Myers' report regarding Eagleson on May 19, and asking Myers to date and sign it. She testified that she was not surprised by Myers' complaint as she purportedly had already heard of Eagleson's conduct during the weekend from Beery. Beery, according to McCluer, told Myers to put her complaints in writing and to give it to McCluer, but that she, Beery, nevertheless wanted to let McCluer know what had occurred during the weekend with Eagleson.

On May 20, Eagleson received a "final written warning" for "unsatisfactory work performance." (See GCX-8).[14] Although GCX-8 is signed by McCluer, when asked by the General Counsel who made the decision to issue Eagleson the warning, McCluer answered with less than complete certainty, "Would've been [CHR]." She did admit to being involved in the decision-making process, but insisted that the final decision to issue the warning was made by CHR, not her. McCluer testified that she provided information to CHR which led to the warning. She explained, however, that she was not the only one to do so and that others also provided information. McCluer did not identify who else provided information which led to the May 20 warning, or what the information consisted of. As to the information she herself provided to CHR, that information, she contends, involved complaints she purportedly received from nursing staff and nurse aides, again unidentified, about Eagleson not doing his work, such as not providing showers to or turning over residents, not changing residents' clothing, and not answering call lights or alarms. McCluer was not certain how long these alleged work deficiences by Eagleson had been going on, but claimed that these problems were called to her attention several weeks after he transferred to first shift. As noted, she could not recall when this change in shift occurred. Prior to that, McCluer had not received any complaints about Eagleson's performance. (Tr. 51-53).

McCluer testified that on May 20, after being told by some unidentified person at CHR to issue Eagleson a final warning, she prepared GCX-8 and then called Eagleson into her office and issued the warning. She testified that she neither discussed nor made a recommendation to CHR as to the level of discipline that should be imposed on Eagleson, nor did she recall having any discussion with Garrison regarding the disciplinary measure that ought to be taken. McCluer also could not explain why CHR chose to issue a final written warning to Eagleson, instead of some lesser form of discipline. According to McCluer, the May 20, warning was the first performance-related written disciplinary measure ever issued to Eagleson. No one from CHR was called, nor were any documents that may have been prepared in connection with CHR's decision to issue the May 20, final warning to Eagleson produced to explain how or why CHR decided to issue the warning.

Eagleson denied ever being orally counseled by McCluer prior to May 20, or receiving, other than the smoking warning, any complaints about, or discipline for, his performance prior to May 20. As to the May 20, warning, Eagleson claims that McCluer never discussed the specific nature of the complaints she purportedly received from "some nurses" referenced in the warning, and simply told him to be more alert and aware. (Tr. 166-167).

Eagleson took vacation from June 30, through July 6. He testified that between May 20, when he received the warning for poor work performance, and June 30, when he began his vacation, he received no further complaints about his work from McCluer. (Tr. 160). McCluer agrees that between May 20 and June 30, Eagleson received no additional written warnings for poor performance. She contends, however, that Eagleson's conduct did not improve any during that period but rather remained essentially the same.

[14] GCX-8, in pertinent part, reads as follows: "It has been reported by several nurses that your work performance is unsatisfactory. The nurse is your supervisor. When asked to do a job, it is considered a direct work order. Failure to comply is insubordination. You are to be professional in your behavior @ all times. Any further complaints of unsatisfactory work could result in termination."

According to Eagleson, on July 8, just two days after returning from vacation, he and Butler were in the hallway when McCluer approached and told him that his work was starting to slide a little bit and that he needed to pick it up a little more. Eagleson did not recall anything else being said during that encounter. McCluer recalled having such a conversation with Eagleson in Butler's presence, although she could not remember when it occurred. She testified that the conversation was prompted by Eagleson's request to switch his weekend work, and that, during that conversation, she told Eagleson that "his work performance remained [sic] a concern when it came to providing the resident care during the week." She did tell him that the weekend staffs had reported some improvement, but that she still had concerns about switching weekends. Butler admits being present during that conversation and recalls that the question of switching from weekend work came up after McCluer told Eagleson she was still having problems with his performance. Butler recalls McCluer telling him she would see what she could do about switching his weekend work. (Tr. 168-169; 58; 285).

McCluer contends that on July 10, she prepared a document, received into evidence as RX-32, in order to record her personal observations of, and what had been told to her about, Eagleson's failure to complete shower sheets, and to document that this particular matter had previously been discussed with Eagleson. Certain factors, however, lead me to question the reliability and trustworthiness of RX-32. In RX-32, for example, McCluer states that Eagleson "oftentimes will tell a resident 'I will do your shower after breakfast'" and "reportedly does not ever do it…" However, McCluer, neither in her statement nor at the hearing, identified the particular resident who purportedly reported this matter to her, nor when this alleged incident occurred. Nor were any of the staff members, who purportedly did the showers that Eagleson allegedly never performed, identified by McCluer. Further, McCluer's assertion in RX-32, that Eagleson had failed to properly complete certain shower sheets, is not capable of being corroborated, for she testified that the shower sheets she presumably reviewed and relied on in completing RX-32 were discarded or destroyed after 30 days and, therefore, no longer available for production.[15] In short, the only evidence in support of RX-32 is McCluer's own testimony, which I found unconvincing and self-serving.[16] In this regard, I note that McCluer provided ambiguous, if not inconsistent, testimony on whether this document was subsequently forwarded to CHR in

[15] Given that the shower sheets presumably might contain entries of a medical nature, I find it highly unlikely they would not have been preserved in some or fashion.

[16] The questionable and unreliable nature of McCluer's testimony regarding this document is further apparent from her confusing, if not inconsistent, statements relating to whether RX-32 was forwarded to CHR, along with other documents, prior to Eagleson's discharge on July 15, discussed infra. McCluer, for example, testified that "all of the documents that I obtained during an investigation" of Eagleson that purportedly commenced on July 11, as well as RX-32, were "faxed" to CHR on July 15, the same day CHR purportedly decided to terminate Eagleson, and that no documents were sent to CHR after the July 15, discharge decision was made and communicated to her that same day. (Tr. 117; 600-601). When questioned by the judge regarding RX-32, McCluer again stated that RX-32 had been faxed to CHR. However, when asked about the existence of a possible cover sheet for the fax transmission, McCluer abruptly changed her story and claimed that RX-32 had not been faxed (Tr. 597-598). McCluer's testimony regarding RX-32 was, as pointed out to her at the hearing, not particularly credible. In fact, RX-32 strikes me a purely self-serving statement possibly created by McCluer after the fact to bolster Respondent's explanation for Eagleson's discharge. That McCluer would fabricate evidence is not unusual for, as previously discussed, GCX-12, a document prepared by McCluer containing false complaints attributed to Okuley and Giesege, was apparently also fabricated, in all likelihood, by McCluer, and Okuley's credited testimony about McCluer asking her to provide a written, but false statement about Eagleson not doing showers further lends credence to this conclusion.

connection with Eagleson's July 15, termination, discussed below. Accordingly, I give no weight to RX-32. Eagleson, it should be noted, did not work on July 10.

On July 11, Eagleson was suspended from work pending an investigation into whether he had failed or refused on various occasions that day to follow instructions from charge nurse Basinger to place a TABS alarm on resident patient Karen Palmer, a high risk patient.[17] Basinger testified that on the morning of July 11, as Eagleson and Marceen Eagleson (herein Marceen)[18] were about to enter Palmer's room during performance of their rounds, she approached and told them that Palmer "now had a TABS alarm that had to be on at all times." (Tr. 458). She claims that a short while later, while Eagleson and Marceen were on their morning break, she went by Palmer's room and noticed that Palmer did not have the TABS alarm on her. When she questioned Eagleson about it, he admitted putting Palmer to bed and explained that the alarm had not been placed on her because Palmer was laying too low on her bed for the alarm to reach. Basinger purportedly told Eagleson that Palmer needed to be pulled up in the bed, and directed him to install the alarm. She claims, however, that Marceen, not Eagleson, complied with her directive and installed the alarm on Palmer even though she had asked Eagleson, not Marceen, to do so. Basinger agreed that the alarm was placed on Palmer by Marceen that day, and admitted that there was nothing improper in Marceen volunteering to do so. She further agreed that she at no time instructed Marceen to let Eagleson perform the task.

Basinger claims that at around lunchtime, she went by Palmer's room and saw the door closed. When she entered the room, she saw Palmer sitting on the commode without the TABS alarm on her. She then searched the bed and found the alarm under a pillow. Basinger claims she became furious at that point because she had repeatedly instructed Eagleson to make sure Palmer had the alarm on her at all times. However, she admitted knowing that Palmer had in the past removed the TABS alarm herself and that she never considered the possibility that Palmer may have done so in this instance, and did not question Palmer about it. Nor did she bother to ask Eagleson if he had placed the TABS alarm on Palmer so as to determine if Palmer had possibly been responsible for removing the alarm herself (Tr. 473).

Nevertheless, Basinger claims she went and discussed the matter with Schroeder at the nurses' station. Basinger contends she told Schroeder that Eagleson needed to be written up for not placing a TABS alarm on Palmer, and that, on telling Schroeder she was too busy doing other work to prepare such a report, Schroeder agreed to do it for her. Schroeder, according to Basinger, then prepared the write-up on Eagleson which Basinger then signed. (RX-18).[19]

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[17] A "TABS" alarm is a box-like device containing a string, one end of which is fastened with an alligator clip-like clasp to the patient's clothing, the other to the box, set away from the patient, with a magnet. In the event the patient moves or seeks to leave the bed, the magnetic side of the string will detach from the box triggering the alarm, thereby notifying staff of the patient's movement. The clasp which attaches to the patient can readily be unclipped by the patient himself or herself, a practice which McCluer concedes often occurs at the facility. (Tr. 62). A document received into RX-8 reflects that an order to have a TABS alarm placed on Palmer was issued by a Dr. Pierson and received by Basinger on July 10, at 11:15 am.

[18] Marceen is Eagleson's aunt.

[19] Although Schroeder testified in this proceeding, she made no mention in her testimony of having had any such discussion with Basinger on July 11, or of preparing RX-18 for Basinger. Further, Basinger and McCluer gave conflicting testimony on who the handwriting on RX-18 belongs to, with Basinger claiming that, except for her signature, the handwriting on RX-18 belongs to Schroeder, and McCluer stating the handwriting is Basinger's (Tr. 463; 100). While I do not doubt that Basinger is capable of recognizing her own handwriting, the inconsistency

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Basinger contends that after receiving the write-up (RX-18) from Schroeder, she gave it to Garrison (Tr. 463-464). Both Garrison and McCluer appear to contradict Basinger on this latter point, for Garrison claims she first learned of the TABS alarm incident from McCluer, and McCluer testified that she received RX-18 from Basinger. (Tr. 99, 386). Basinger did not claim to have provided McCluer with a copy of RX-18. Later that same day, purportedly on instructions from McCluer, Basinger prepared a second written report stating that she had, on three separate occasions on July 11, instructed Eagleson to make sure Palmer had the TABS alarm on. (RX-19). Basinger admits she never discussed with McCluer the possibility that Eagleson may have placed the TABS alarm on Palmer and that Palmer removed it on her own, as she apparently had done on other occasions. (Tr. 514)

Eagleson gave the following account of the July 11, events. When he left work on July 9, there had been no order for Palmer to have a TABS alarm placed on her. When he arrived to work on the morning of July 11, he was unaware that an order had been placed for Palmer to have a TABS alarm, and that he first learned of the order from Basinger while he was on his morning break. He recalls Basinger approaching him and asking who had put Palmer to bed. When he replied that he did, Basinger told him he forgot to put the alarm back on Palmer. Eagleson responded that he did not know Palmer was required to have one on her. He testified that he started work that day, he did not check with anyone to see if such an order had been placed because he and other STNAs are usually made aware of it without having to ask. (Tr. 171; 201).

Butler's testimony on how STNAs learn of a resident's need for a TABS alarm is that the STNA will at times simply ask a nurse or learn of it through word of mouth. She testified that STNAs are not regularly told about a patient's need for a TABS alarm at the start of their shifts. Butler further claims that while the practice "years ago" had been to notify STNAs at the start of a shift of any such requirement via a report made available in the morning, that practice is no longer being followed. (Tr. 280).

Eagleson admits that when Basinger informed him during the morning break about the TABS alarm order for Palmer, he did not go to Palmer's room to install the alarm because Marceen indicated she was going back in and agreed to place the alarm on Palmer for Eagleson. Eagleson denied telling Basinger that Palmer was too low in her bed for the alarm to be affixed to her, and denied being told by Basinger on three separate occasions that day that Palmer needed to have an alarm on her at all times. Rather, he insisted that the first and only time he heard of the TABS alarm requirement for Palmer was during his morning break. (Tr. 203).

Schroeder, who served for a time as a nurse, provided some testimony regarding resident patient Palmer and the TABS alarm. She recalls Palmer being the main "problem resident" at the facility when it came to the alarms. Palmer, she recalled, frequently pulled off the alarm on her own, or would just stand up and disconnect the magnet from the alarm. McCluer agreed with Schroeder's assessment of Palmer as a problem resident when it came to TABS alarm, for she testified that "employees generally knew that Palmer didn't like to have an alarm on her." (Tr. 97). She explained that it was everyone's responsibility at the facility to ensure that patients were safe at all times, and that if Palmer removed the alarm on her own, she, as a nurse, would not hold the STNA responsible for the alarm being disconnected. (Tr. 222). Schroeder recalled that as a nurse, she had occasion to remind STNAs to put alarms on patients, citing in particular, aides

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between her testimony and that of McCluer on who the handwriting belongs to, and the failure by the Respondent, who produced and offered RX-18 to support its position, to question Schroeder about the document, or to have her authenticate the handwriting therein as her own, leads me to question the reliability and trustworthiness of RX-18.

Betsy Facinda and Rachel Lester who, despite being reminded on several occasions to do so, were, to her knowledge, never disciplined for not checking to see if residents were wearing their alarms. She testified that, as far as she knew, prior to July 15, no STNA had ever been disciplined for failing to place an alarm on a resident (Tr. 223). Schroeder claims that on July 11, she was not serving as a nurse but rather was working with the social service department, and that she had an opportunity to visit the nurses' station, which is situated next to Palmer's room, during the course of the morning. She recalled that while there, Palmer's TABS alarm went off between six to eight times, which she contends was not unusual for Palmer, a fact confirmed by charge nurse, David Tucker, who testified that it was not uncommon for Palmer to, from time to time, remove the TABS alarm herself, and that Palmer's alarm frequently went off. (Tr. 514). Each time Palmer's alarm went off, either she or an aide went in and placed the alarm back on her. Schroeder, as noted, made no mention in her testimony of being spoken to by Basinger on July 11, about the TABS alarm problem, or of preparing RX-18, as claimed by Basinger.

Eagleson testified that at around 2:00 pm on July 11, he was called into the main office where he met with McCluer and Garrison. At that meeting, the latter told Eagleson that a report had been made, corroborated by an eyewitness, alleging that he had failed to place a TABS alarm on Palmer, that he was being suspended until further notice pending an investigation, and that he would be notified of the outcome of the investigation. Eagleson claims that at no time during the July 11, meeting was he given an opportunity to explain the circumstances surrounding Palmer's TABS alarm. He contends, however, that he told McCluer and Garrison that he did not know Palmer required a TABS alarm. Four days later, on July 15, Eagleson, accompanied by Butler, went to meet with McCluer and Garrison pursuant to a phone call he received earlier that day. He testified, without contradiction, that at no time during the four-day period between the July 11, suspension and July 15, when he was discharged, was he questioned by McCluer or anyone else regarding the investigation.

McCluer's testimony regarding the July 11, TABS alarm incident is that on July 11, she was outside on a morning break when Basinger angrily approached her and complained that Eagleson had failed to apply a TABS alarm to Palmer for the second time that morning, and that she instructed Basinger to write him up (Tr. 105). McCluer does not know whether or not Basinger actually prepared a write-up for Eagleson at that time. She contends, however, that later that day, before she had a chance to follow up with Basinger on her suggestion for a write-up, Basinger came to her with another complaint about a third occurrence regarding Eagleson. It was then that Basinger, according to McCluer, prepared RX-18 at the latter's request and gave it to her. Basinger, it should be noted, made no mention in her testimony of having had any such conversation with McCluer about Eagleson during the latter's morning break on July 11, or of being asked by McCluer during that brief encounter to prepare a write-up on Eagleson. Rather, as previously discussed, Basinger testified only to having discussed the write-up with Schroeder, and that after Schroeder prepared the write-up for her, she, Basinger, gave it to Garrison, not McCluer. Basinger also never claimed to have prepared RX-18 at McCluer's request, as claimed by the latter.

Regarding her July 11, meeting with Eagleson, McCluer's testimony was filled with uncertainty and ambiguity. Asked, for example, if she was the one who summoned Eagleson to the July 11, meeting, McCluer replied, "I believe so." As to whether Garrison was present at that meeting, McCluer stated, with some hesitation, " I believe Kelly [Garrison] was there as well." She did not, however, recall whether anyone other than herself, Garrison, and Eagleson was present, nor could she specifically recall what she may have told Eagleson was the reason for his suspension, or what, if anything, Eagleson may have said during that discussion. Asked whether the suspension was triggered by a report received from the charge nurse regarding the TABS alarm, McCluer replied, "I believe [so]." She did recall telling Eagleson that he was being suspended pending an investigation, and that he would be contacted following the investigation. She and Garrison both contend that at this meeting, Eagleson was asked to provide a statement of his own regarding Basinger's claim. Neither McCluer nor Garrison recalled receiving any statement from Eagleson, and Garrison simply could not recall what, if any, response Eagleson had to the request. According to Garrison, Eagleson simply shrugged his shoulders.[20] Eagleson denied being asked by McCluer or Garrison to provide a statement (Tr. 622). Given McCluer's and Garrision's vague and poor recollection of what occurred at that meeting, I credit Eagleson and find that he was never asked to provide a statement. McCluer claims that she unaware of any incident occurring prior to July 11, where other STNAs had neglected, failed or forgotten to place a TABS alarm on a resident. She explained that if it had occurred, she expected the matter to be reported to her but that, to her knowledge, no such report had ever been provided to her in the past. (Tr. 66).

After receiving RX-18 from Basinger, McCluer claims she consulted with CHR on how to proceed regarding Basinger's complaint. McCluer purportedly was told by CHR to suspend Eagleson and to conduct an investigation into the incident. She contends that based on those instructions from CHR, she conducted an investigation that included obtaining a more detailed statement from Basinger (see RX-19), as well as statements from other staff members who, she further contends, had independently approached her with knowledge of the incident. (Tr. 63-65). According to McCluer, her investigation extended not just to soliciting statements about the TABS alarm incident but also about Eagleson's overall job performance. She claims that "most" of the individuals she sought statements from asked her if the investigation had to do with the TABS alarm incident, and that she specifically told them their statements were to be used as part of investigation being conducted into Eagleson's job performance and the TABS alarm incident (Tr. 590). McCluer could not recall questioning Eagleson about TABS alarm incident but believes she may not have done so. Nor could she recall asking the other STNA who worked with Eagleson that day for a statement,[21] and did not question patient Palmer about the matter.

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[20] Garrison, by her own admission, had a poor recollection of the TABS alarm incident (Tr. 386). For example, she had no independent recollection of what action was taken against Eagleson in response to the July 11, TABS alarm incident. Only when shown a suspension notice issued to Eagleson containing her and McCluer's signature (see RX-7) was she able to say that Eagleson had been ordered suspended by CHR pending an investigation into the incident (Tr. 388). Further, when asked if the investigation delved into other matters besides the TABS alarm incident, Garrison initially responded, "Not that I recall." Only after she was again shown RX-7, which states that the suspension was for "unsatisfactory work performance," did Garrison change her answer to reflect that the investigation including a review of Eagleson's overall work performance (Tr. 388). Nor could Garrison recall, without some prompting from Respondent's counsel, what occurred following the investigation, the date on which Eagleson was notified of his discharge, or what was said at the discharge meeting (Tr. 393).

[21] Generally, two STNAs work together covering a particular hall and oftentimes work together to perform their assigned duties.

David Tucker, the other charge nurse on duty on July 11, and Marceen Eagleson, were two of the individuals asked to provide statements about the events of that day. (See RX-15; RX-17). Tucker testified that McCluer did not explain to him why she needed the statement, thus contradicting McCluer's assertion that all those asked to provide a statement were told that it was part of an investigation she was conducting into Eagleson's work performance and the TABS alarm issue. In his statement, Tucker states that he "personally heard [Basinger] tell [Eagleson] that Karen Palmer's alert is to be on at all [times]" and heard Eagleson respond that "he did not know that." At the hearing, Tucker testified that between 7:30-8:30 am on July 11, during the residents' breakfast, he reminded Eagleson about the TABS alarm requirement because he knew Eagleson had forgotten to put the alarm on Palmer earlier, and that Eagleson replied that Basinger had already told him about it. Eagleson, it should be noted, denies being spoken to by Tucker on July 11, about Palmer's TABS alarm (Tr. 622). Regarding his written statement, Tucker initially testified that he heard Basinger tell Eagleson about the TABS alarm on either two or three occasions that day. However, he subsequently admitted on cross-examination that he only heard Basinger tell Eagleson about the alarm on one occasion, and that he learned of the other two occasions from a third source, presumably Basinger herself. Tucker's written statement, it should be noted, does not mention that he overheard Basinger tell Eagleson on two or three separate occasions on July 11, to place a TABS alarm on Palmer, or of him separately reminding Eagleson that day about Palmer's need for a TABS alarm.

Regarding any conversations he may have had with Basinger on July 11, about the TABS alarm incident, Tucker's testimony was less than clear. On direct examination, Tucker testified that Basinger told him on July 11, that Eagleson had failed to place a TABS alarm on Palmer after being instructed to do so. Asked again on cross-examination if he was ever told by Basinger on July 11, that Eagleson had not placed an alarm on Palmer after being instructed to do so, Tucker seemed less certain. Thus, in response to the General Counsel's question, Tucker replied, "Not in the terms you're stating, no." Tucker explained that the tone of the General Counsel's question suggested that Eagleson had refused to do so out of defiance, and that he, Tucker, did not view it that way. Rather, he testified that Basinger only told him which patients' rooms had been assigned to Eagleson that day, and that Palmer's room was one of them. Basinger, he went on, then mentioned that when Eagleson left Palmer's room, "everything should've been in place, the alarm on [Palmer] and so on and so forth" but that "the alarm was not on." Asked again if this is what Basinger told him had occurred that day, Tucker answered, "Probably not in, not verbatim, but that's the gist of it, yes." (Tr. 516). Tucker was not certain when on July 11, this conversation with Basinger took place, and speculated that it might have occurred around 7:00 or 7:30 am. (Tr. 501; 516).

Finally, Tucker testified that on several occasions on the morning of July 11, he went to Palmer's room and each time found the TABS alarm properly in place. He admits, however, that he never notified Basinger of his observations, and made no mention of that fact in the written statement McCluer asked him to provide as part of her investigation. Nor did McCluer, Tucker further admitted, ever ask him if the alarm had been placed on Palmer at any time that morning. As to patient Palmer, Tucker noted that her alarm went off quite frequently, "most every day," and that it was common knowledge that Palmer "from time to time would take her own alarm off." (Tr. 514). McCluer herself appeared to corroborate this latter claim by Tucker, for she admitted knowing that Palmer did not like to have an alarm placed on her. (Tr. 97).

McCluer, as indicated, purportedly obtained a written statement from Marceen which, she contends, showed that Eagleson failed to place a TABS alarm on Palmer after putting her to bed. (Tr. 114). Marceen's written statement, received into evidence as RX-17, shows no such thing. Rather, Marceen's statement reflects only that Basinger came out to them during their morning break, asked which of the two had put Palmer to bed and, when Eagleson said he did, instructed the latter, on his return from break, to put the alarm on Palmer. Marceen in her statement does

not say, as claimed by McCluer, that Eagleson failed to place a TABS alarm on Palmer after putting her to bed. Marceen did not testify.

McCluer claims she also spoke with, and solicited written statements from, Schroeder, and employees Kevin Russell and Linda Nichols (see RX-14). The statements from these individuals reflect that on July 11, they observed patient Palmer wandering outside her room without a TABS alarm on. Neither Russell nor Nichols testified at the hearing, and Schroeder, who did testify prior to the Respondent's introduction of RX-14, was never asked about, or given an opportunity to authenticate, much less explain, the statement in RX-14 attributed to her by McCluer, or the circumstances surrounding its preparation. Neither Schroeder, Russell, nor Nichols, it should be noted, claim in their respective statement to have heard Basinger tell Eagleson on July 11, to place a TABS alarm on Palmer, or knowing whether Eagleson had or had not done so that day.

Charge nurse Myers also provided a written statement to McCluer at the latter's request which was critical of Eagleson's overall job performance (RX-23). Like Tucker, Myers denied being told by McCluer that her statement was to be used as part of an investigation being conducted into Eagleson's overall job performance and the July 11, TABS alarm incident. Myers, in fact, had little recollection of the circumstances surrounding McCluer's request for such a statement (Tr. 439-440). Myers claims she prepared her statement the same day it was requested, but that she turned it in to McCluer on July 15, the same day Eagleson was terminated (Tr. 435). Although she could not recall precisely when on July 15, Myers believes she may have typed RX-23 at home after her shift ended at 2:30 pm, and turned it in to McCluer at some point after that.[22] (Tr. 441). McCluer similarly could not recall when she received Myers' statement, but believes it was sometime late in the afternoon of July 15, but before Eagleson was told of his termination which presumably was around 3:45 pm.

McCluer claims that on July 15, after receiving all the statements and completing her investigation, she faxed the statements and other disciplinary write-ups in Eagleson's personnel file, including her own July 10 write-up (RX-32), to CHR, after which she was notified at around 3:00 pm by some individual at CHR, whom she did not or could not identify, that a decision had been made to terminate Eagleson.[23] (Tr. 601). McCluer admits that CHR never disclosed to her

[22] While Myers' shift normally ended at 2:30 pm, she testified that there were times she left work later, such as between 3:00-3:15 pm, in order to finish up other things. There is no indication from Myers' testimony whether July 15, was one of those days when she stayed after work. Her testimony regarding when she may have turned in RX-23 to McCluer or as to how late she worked that day is vague.

[23] McCluer's claim that she and Garrison were notified by CHR at around 3:00 pm of its decision to have Eagleson terminated suggests that the documents purportedly faxed by McCluer to CHR regarding Eagleson, which McCluer claims included RX-23 (Myers' July 15, statement) must have been sent to CHR prior to 3:00 pm. Myers, it should be noted, testified, albeit with some uncertainty, that she typed RX-23 at her home sometime after her shift ended at 2:30 pm on July 15, and turned it in to McCluer at some point after that. Myers, according to McCluer, lived one-half hour from the facility at the time (Tr. 606). The above testimony by Myers and McCluer clearly undermines and renders patently false McCluer's claim that she faxed RX-23 to CHR, along with other documents, sometime before 3:00 pm. Thus, if McCluer is correct that Myers lived one-half hour from the facility, then it would have taken Myers more than one hour after ending her shift at 2:30 pm that day to go home, prepare RX-23, a one-page typewritten document, and return to the facility to turn in RX-23 to McCluer. This scenario, based on Myers' and McCluer's above testimony, establishes that Myers could not have given McCluer RX-23 at any time prior to 3:30 pm, which is more than one-half hour after McCluer claims she had RX-23

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or Garrison the factors it relied on in reaching its decision (Tr. 608). She did, however, express her belief that CHR might have documentation showing the person with whom she and Garrison consulted and who at CHR made the ultimate decision to terminate Eagleson. (Tr. 577). Unfortunately, no such evidence was produced at the hearing, and no claim has been made by the Respondent that CHR does not keep a record of such disciplinary discussions between the managers at its facility and the personnel at CHR. Garrison testified that while she and McCluer presented the facts to CHR and discussed Eagleson's behavior and performance, she was never asked to give a recommendation as to the nature of the discipline to be imposed on Eagleson, and that the ultimate decision to fire Eagleson was made by CHR.[24] According to McCluer, after receiving word from CHR that Eagleson was to be terminated, Garrison, who was with McCluer at the time, phoned Eagleson at home and asked him to come to the office. According to McCluer, Garrison placed the call somewhere between 3:15 pm and 3:45 pm. (Tr. 604).

At the July 15, meeting, McCluer and/or Garrison told Eagleson that an investigation had been conducted that was not favorable to him, and that he was being terminated.[25] When he asked why, Eagleson was told that his conduct amounted to "neglect," and that his "work performance was terrible." As to his work performance, Eagleson recalled being told that his "showers were not getting done, [the] shower sheets were not getting done," and his residents "were not getting cared for properly." (Tr. 176-178). As to the latter, Eagleson was purportedly told that he was "not turning the residents like they should be…[and] not making sure the residents were dry," claims which Eagleson insists were not true. He also denied failing to turn in shower sheets, stating that he oftentimes asked the nurses for help when he did not understand a patient's particular needs. Although Eagleson's work performance had, by McCluer's account, been deficient for some time prior to July 11, McCluer readily admitted that at no time prior to July 11, TABS alarm incident was the Respondent planning to suspend or terminate Eagleson. (Tr. 71-72).

C. Analysis

1. The Respondent's ban on buttons

The complaint alleges, and the General Counsel contends, that the Respondent's dress code policy prohibiting the wearing of "buttons, hats, pins, or other types of unprofessional or unauthorized insignia that might represent any political, economic, or industrial organization" is

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in her possession. I am convinced, and so find, that McCluer was not being truthful in claiming that she faxed RX-23, along with other documents, to CHR at some point prior to allegedly being notified by CHR at 3:00 pm that Eagleson was to be terminated, as it would have been highly unlikely, if not impossible, for Myers to have delivered her report to McCluer before 3:30 pm that day.

[24] Garrison was vague on whether she and McCluer were ever asked by CHR to make a recommendation regarding the imposition of discipline on an employee. Thus, asked if no such recommendation is ever solicited from her or McCluer by CHR, Garrison stated that she could not say that no recommendations were ever sought. However, when asked to cite instances when such a recommendation was sought from her, Garrison could not recall any. (Tr. 417).

[25] A Notice of Correction form dated July 15, and signed by McCluer and Garrison, states the reason for Eagleson's discharge to be an "Unsatisfactory Work Performance." (See RX-9). Neither McCluer nor Garrison testified as to the circumstances surrounding the preparation of RX-9. It is not known, for example, who prepared RX-9. Nor was it explained either by McCluer or Garrison why RX-9 cites Eagleson's alleged "unsatisfactory work performance" as the basis for the discharge when, by McCluer's own admission, CHR never disclosed to her or Garrison the factors it relied on in deciding to terminate Eagleson.

overly broad and unlawfully interferes with its employees' Section 7 rights. I find merit in the allegation.[26]

The right of employees to wear union buttons or other insignia at the workplace is generally protected by the Act, and, absent special circumstances, an employer's prohibition against the wearing of such buttons or insignia violates Section 8(a)(1) of the Act. *St. Luke's Hospital.*, 314 NLRB. 434, 435 (1994); also, *Mt. Clemens General Hospital v. NLRB*, 328 F.3d 837, 844 (6th Cir. 2003). Special circumstances have been recognized in areas involving employee efficiency, safety, and discipline. *Pay 'N Save Corporation*, 247 NLRB 1346, 1349 (1980). The burden of establishing the existence of special circumstances rests with the employer. *RCN Corp.*, 333 NLRB No. 45 (2001). The Respondent has not satisfied that burden here.

As noted, the Respondent's dress code policy, on its face, does not ban the wearing of all buttons. Rather the ban applies only to the wearing of buttons having a particular message, e.g., those showing support for a political, economic, or industrial organization. The ban, therefore, applies to the wearing of union buttons, including the "YES" button depicted in GCX-4, as the Union clearly qualifies as an industrial organization. The Respondent presented no evidence to show, nor did it argue at the hearing or in its post-trial brief, that employee use of buttons containing prounion messages would somehow have a deleterious effect on the efficient or safe operation of its facility, or would create disciplinary problems among employees and/or other staff members. Consequently, the Respondent has not met its burden of showing the existence of special circumstances warranting its ban on employee use of union buttons at work. The dress code ban on the wearing of buttons would still be overly broad and unlawful even if, as hypothetically suggested by McCluer, buttons having a pin-type attaching mechanism could potentially fall off an employee's uniform and injure a resident,[27] for the prohibition is not restricted to the use of buttons in resident care areas only, but rather appears to extend to the entire facility, including areas which might be off limits to residents and frequented by employees only. Accordingly, I find, as alleged in the complaint, that the ban in the Respondent's dress code policy on employee use of buttons at the workplace to be unlawful and in violation of Section 8(a)(1) of the Act.

2. The April 30 button-related suspension of Butler and Eagleson

The complaint also alleges, and I agree and find, that the April 30, suspension of Butler and Eagleson for refusing to remove buttons, including the Union's "YES" button, from their uniform was unlawful. As noted, McCluer and Garrison both gave very different reasons for requiring Butler and Eagleson to remove their buttons on April 30. McCluer claims that the buttons with a pin-type mechanism posed a safety hazard for residents as they could fall off an employee's uniform and injure the resident. As previously pointed out, no evidence was produced by the Respondent to show that it had had problems in the past with buttons falling off

[26] The Respondent, on brief, has not taken any position regarding the validity or invalidity of its dress code policy. However, it does rely on its dress code policy to defend its April 30, suspension of Eagleson and Butler for refusing to remove their buttons, suggesting implicitly thereby that it views its dress code policy restricting the types of buttons that can be worn by employees as lawful.

[27] The Respondent has presented no evidence to show that residents have, in the past, been injured by buttons falling of an employee's clothing. Thus, McCluer's claim that buttons with a pin-type mechanism could potentially fall off an employee and injure a resident is based on nothing more than speculation and conjecture.

employee uniforms and injuring residents. Further, Eagleson's and Butler's credited testimony makes patently clear that they, as well as other employees, had been openly wearing buttons for some time prior to April 30, without being asked to remove them. I am convinced that McCluer must have seen Eagleson, Butler, and other employees wearing such buttons on their uniforms, including the "Freedom Over Fear" button that Eagleson, Butler, and other employees wore for some time prior to April 30. McCluer nevertheless took no action to have employees remove their buttons notwithstanding that whatever safety concerns McCluer may have had on April 30, when she asked Butler and Eagleson to remove their buttons, were also present during the weeks preceding April 30, when Butler, Eagleson, and others wore their buttons to work. In fact, the "Freedom Over Fear" button worn by Butler, Eagleson and other employees on their uniforms for weeks preceding April 30, was of the pin-type variety which McCluer claims posed a safety hazard. Yet, despite this alleged safety hazard, McCluer, at no time prior to April 30, asked any employee to remove the "Freedom Over Fear" button from their uniforms. It is patently clear, therefore, that McCluer's claim, that safety was her sole motivation for asking Butler and Eagleson to remove their buttons, is simply not credible. Rather, I am convinced that it was the fact that Eagleson and Butler had on the prounion "YES" button, and not safety concerns, which prompted McCluer to demand that they remove all their buttons from their uniforms.

Unlike McCluer, safety was not a primary concern for Garrison. Rather, Garrison's problem was that she felt that Butler and Eagleson were wearing too many buttons on April 30. She explained at one point that had the amount of buttons worn by them been fewer in number, she would not have been concerned. She did not explain just how many buttons would have been acceptable. However, Butler credibly testified that she was wearing only two buttons that day, and Eagleson, according to McCluer, was wearing between 2-5 buttons, hardly the large numbers described by Garrison. Garrison subsequently changed her testimony by stating that once she had a chance to review the dress code policy, she concluded that even the wearing of one button was prohibited by the policy. Her claim in this regard lacks merit for, as previously discussed and found, the dress code policy does not ban the wearing of any and all buttons by employees. Rather, the ban applies only to buttons containing a particular message. Thus, Garrison's reliance on the dress code policy to justify suspending Butler and Eagleson on April 30, for failing to remove their buttons is misplaced for the policy contains no such ban. What is banned by the policy, unlawfully so as found above, is the type of Union button worn by Butler and Eagleson that day. It is patently clear to me, and I so find, that the target of Garrison's and McCluer's ire on April 30, was not the number of buttons Butler and Eagleson were wearing that day, which as found above were few in number, or the hypothetical and unsubstantiated safety concern raised by McCluer, but rather the fact that they were wearing the Union's "YES" button. Their suspension from work for refusing to remove their buttons, occurring as it did just two days before the Board's election, supports the view that the action taken against Butler and Eagleson was intended to discourage employee support for the Union in the upcoming election. Accordingly, I find that the April 30, one-day suspension of Butler and Eagleson for refusing to remove their union buttons was discriminatorily motivated and violated Section 8(a)(3) and (1) of the Act.

3. Okuley's 30 day Work Improvement Plan

The complaint further alleges, and the Respondent denies, that the 30-day work improvement plan issued to Okuley on May 21, was unlawfully motivated by her Union activities and thus unlawful. I find merit in the allegation.

Applying a *Wright Line*[28] analysis to the issue at hand, I find that the General Counsel has made a prima facie showing that the issuance of the 30-day work improvement plan to Okuley was motivated, if not wholly at least in part, by antiunion considerations. There is no disputing that Okuley was a union supporter and that the Respondent was fully aware of that support prior to issuing her the 30-day working improvement plan. Thus, McCluer, as noted, admitted knowing of Okuley's prounion sympathies and/or involvement with the Union. Further, Schroeder's credited testimony makes clear that Garrison and other members of Respondent's management/supervisory team were also fully aware of Okuley's union sympathies and, in fact, believed that she, along with Butler, were the Union's leading adherents at the facility who were primarily responsible for bringing in the Union. McCluer's remark at the management team meetings, that the Union's support might fizzle out if Okuley and Butler were no longer working for the Respondent, together with the Respondent's unlawful interference with the right of employees to wear union buttons at work, and its unlawful suspension of Butler and Eagleson for refusing to remove their prounion buttons, provide clear evidence of the Respondent's antiunion animus. I am convinced, given the statements made by McCluer and possibly others at the management meetings, that the imposition of the 30-day work improvement plan on Okuley may very well have been intended to persuade Okuley into quitting her position in the hope that her departure would, as discussed by McCluer at the management meetings, cause the Union's support among other STNAs to "fizzle" out. Having found that the General Counsel has made out a prima facie case of discrimination against Okuley, the burden now shifts to the Respondent to demonstrate that the 30-day work improvement plan issued to Okuley was motivated by legitimate, nondiscriminatory reasons and would have been issued even if Okuley had not engaged in Union activity.

The Respondent denies that Okuley's Union activity had anything to do with the issuance of the 30-day work improvement plan and contends that its decision to put Okuley on the 30-day plan was based solely on the several work-related performance problems described in GCX-5 that Okuley was experiencing prior to May 21. Its contention is without merit. As discussed and found above, some of the work-related problems attributed to Okuley in GCX-5 either did not exist (Okuley's "poor attitude"), or did not occur (not showering a patient; not responding to pages from nurse aides, not turning in shower sheets on time). Regarding Okuley's occasional failure to clock in and out during breaks, her credited testimony makes clear that this occurred for only a brief period soon after the clocking in and out rule was put into effect, that other employees had similarly failed to abide by the rule and were not disciplined, and that, immediately prior to receiving the 30-day work improvement plan on May 21, she had been complying with the rule. The Respondent produced no evidence, Okuley's timecard for example, to refute her claim that she had been clocking out during her breaks immediately before May 21, or to show that other employees had been placed on work improvement plans or disciplined in some other manner, for not abiding by its clocking in and out rule. Nor did it explain why Okuley was singled out and

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[28] 251 NLRB 1083 (1980), enfd. 662 F.2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). In *Wright Line*, supra, the Board established a causation test for determining whether action taken against an employee violates Section 8(a)(3) and (1) of the Act. The test calls for the General Counsel, as part of his burden of proof, to make an initial prima facie showing that action taken by an employer against an employee was motivated by antiunion considerations. The General Counsel makes out a prima facie case by producing evidence showing that the affected employee was engaged in union activities prior to the action being taken, that the Respondent was aware of or had reason to know of such activities, and that it harbored antiunion animus. Once the General Counsel makes out a prima facie case, the burden shifts to the Respondent to show that it would have taken the same action even if the employee had not engaged in any union or protected activity.

placed on a 30-day work improvement plan for inter alia, failing to comply with its rule when others who engaged in the identical alleged misconduct were not.

The final reason cited in GCX-5 for issuing Okuley a 30-day work improvement program, e.g., that she made "threats against certain staff members," as noted, is patently false for Okuley credibly denied telling McCluer that she intended "to get Mindy." The only comment made by Okuley to McCluer regarding M. Butler was that she, Okuley, intended to file a grievance against M. Butler as soon as a contract was reached because of what Okuley perceived to be M. Butler's harassment behavior towards her, which comment, as previously discussed, was fully protected by the Act and not a threat.

In sum, the false reasons cited by the Respondent for placing Okuley on a 30-day work improvement plan on May 21, the unexplained disparity in treatment accorded her vis-à-vis other employees for having occasionally failed to comply with its clocking in and out rule, and the fact that the 30-work improvement plan was imposed on Okuley, in part, for revealing her intent to file a grievance, a protected activity under the Act, all strongly support the inference that the issuance of the 30-day work improvement plan was retaliatory in nature and motivated not by legitimate concerns over Okuley's work performance, but rather discriminatorily motivated by antiunion considerations.[29] According to Schroeder's credited testimony, Okuley had long been identified by the Respondent as one of two union adherents most responsible for bringing in the Union, the other being Butler, and was of the view that Okuley's and Butler's departure could help undermine employee support for the Union. The 30-day work improvement plan issued to Okuley on May 21, based as it was on false and nonexistent claims of deficiencies in Okuley's work performance, was, I am convinced, intended as a shot across the Union's bow, and a warning to Okuley, Butler, and other unit employees that their continued support for Union could have adverse consequences. Accordingly, I find that the General Counsel's prima facie case has not been rebutted and that, as alleged in the complaint, the Respondent's May 21, decision to put Okuley on a 30-day work improvement plan was motivated solely by her involvement with the Union and, therefore, amounted to a violation of Section 8(a)(3) and (1) of the Act.

4. The May 20, warning issued to Eagleson

The complaint alleges that the May 20, "final written warning" issued to Eagleson for poor work performance was discriminatorily motivated and unlawful. I find merit in the allegation. Initially, the General Counsel has made a prima facie showing that the warning was motivated, at least in part, by Eagleson's union activities. As previously discussed, the Respondent was fully aware of Eagleson's involvement with the Union, and had, in fact, previously and unlawfully disciplined him for such activity when it suspended him on April 30, for wearing a Union button on his uniform. Thus, it is patently clear that the Respondent not only knew of Eagleson's prounion sympathies but also harbored animosity towards the Union and its supporters.

The Respondent's defense of the warning is that it was issued based solely on reports provided to McCluer by Myers and Beery about Eagleson's poor work performance during the weekend of May 17-18. The problem with the Respondent's defense is that, by McCluer's own account, the decision to issue the warning was made not by her but by some unnamed and unidentified individual at CHR. Indeed, her "would've been CHR" response to the General Counsel's question on who made the decision to issue the warning leaves room for skepticism that the decision was, in fact, made by CHR. As noted, the individual or individuals at CHR with whom McCluer spoke on this matter, and who purportedly made the decision to issue the final

[29] *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). *Omahaline Hydraulics Company*, 342 NLRB No. 86 (2004).

warning, were never identified by McCluer nor called to explain the underlying reason for the warning. Nor, as further noted, did the Respondent produce any CHR documents relating to the issuance of this warning by CHR, which could have shed light on who at CHR made the decision and why. While McCluer could not say with certainty if CHR kept a written record of its decisions, she did express her believe that such a record would have been kept by CHR. The Respondent, neither at the hearing nor in its posttrial brief, has contended otherwise.

In sum, the only evidence showing why the warning was issued is McCluer's own testimony, which is dubious at best, and GCX-8, which was prepared by McCluer herself, not by CHR. Having failed to call anyone from CHR, or to produce documentary evidence, to explain how the decision was made, the underlying reason for the decision remains unknown. To accept McCluer's rather suspect testimony that the decision was based on Eagleson's poor work performance during the weekend of May 17-19, would, in these circumstances, amount to speculation for, by McCluer's own account, others beside herself provided information to CHR which might very well have factored into the decision by CHR to issuing the warning. McCluer, however, never explained what that information was, or who provided it. Arguably, therefore, CHR could have based its decision on factors other than the information McCluer allegedly provided to it. Speculation and conjecture as to how CHR reached its decision to issue Eagleson the May 30, warning are a poor substitute for proof and do not suffice as a rebuttal to the General Counsel's prima facie case. I therefore find that the Respondent has not provided a legitimate, non-discriminatory reason for issuing Eagleson the May 20, warning. Accordingly, I further find that the General Counsel's prima facie has not be rebutted, and that the issuance of the May 20, final written warning violated Section 8(a)(3) and (1) of the Act, as alleged.[30]

5. Eagleson's July 11, suspension and July 15, discharge

Finally, it is alleged that Eagleson's suspension on July 11, and subsequent discharge on July 15, was discriminatorily motivated by antiunion reasons and unlawful. The Respondent contends that its decision to suspend and thereafter discharge Eagleson resulted solely from his poor work performance and was not based on any Union activity he may have engaged in. I find merit in the allegation.

First, the General Counsel, I find, has made a prima facie showing under *Wright Line* that the suspension and discharge of Eagleson were motivated, at least in part, by antiunion considerations. The evidence in this regard, including McCluer's own admission and Schroeder's credited testimony, shows that Eagleson was a Union supporter, and that the Respondent had full knowledge of his prounion activities. Further, the Respondent's unlawful ban on the wearing of union buttons by employees, its unlawful suspension of Eagleson and Butler for refusing to remove their union buttons, the unlawful warning issued to Eagleson on May 20, its unlawful issuance of a 30-day work improvement plan to Okuley for her Union activities, and McCluer's

[30] The Respondent's failure to produce any evidence whatsoever from CHR to substantiate McCluer's, and for that matter Garrison's, assertion, that all disciplinary and discharge decisions are made by CHR, casts serious doubt on that claim, especially since neither McCluer nor Garrison were particularly credible witnesses. Rather, I am inclined to believe that the decision to issue Eagleson the May 20, warning was made by McCluer, not by CHR, and that, for reasons unknown, both McCluer and Garrison sought to depict CHR as the sole decision maker. It might very well be that McCluer and Garrison hoped to be absolved of any personal wrongdoing by shifting the responsibility, if not the blame, if a decision went wrong or deemed to be improper, to someone other than themselves. This might very well explain why McCluer was unable to so much as identify where CHR was located, or to name the individual(s) at CHR responsible for the disciplinary actions taken against Eagleson and others.

remark at the various management meetings that employee support for the Union might dissipate if Butler and Okuley were no longer employed by the Respondent, all provide ample proof of the Respondent's animosity towards the Union and its supporters. Accordingly, as the General Counsel has established, prima facie, that Eagleson's suspension and termination was discriminatorily motivated by antiunion concerns, the burden shifts to the Respondent to show that Eagleson would have been suspended and then discharged even if he had not engaged in union activity.

The Respondent has not made such a showing here. Relying primarily on McCleur's and Garrison's testimony, the Respondent asserts that Eagleson was suspended on July 11, and subsequently discharged on July 15, solely for his overall poor work performance. There are, however, strong reasons for doubting that assertion. First, while McCluer and Garrison both insist that Eagleson was discharged solely for his poor work performance, both, as noted, denied responsibility for making that decision, and insisted that the final decision to suspend and then discharge Eagleson on July 11 and July 15, respectively, was made by some unknown, unnamed, unidentified individual at Respondent's CHR offices. Further, McCluer admitted that neither she nor Garrison was told by the CHR individual responsible for Eagleson's suspension and discharge what factors were relied on in making that decision, and that she really did not know what CHR relied on in making its decision. Nor did Garrison claim to know how CHR reached its decision to terminate Eagleson on July 15, or what factors it had relied on. Assuming, therefore, the truth of their assertion that someone at CHR, and not them, made the decision to discharge Eagleson, the actual reason for CHR's decision remains unknown as the person at CHR who purportedly made that decision was never called as a witness to explain his or her decision, nor for that matter either named or identified on the record. The Respondent's failure to call as a witness the CHR individual purportedly responsible for suspending and terminating Eagleson, to explain the reason(s) for doing so, warrants an adverse inference that, if called, the CHR individual's testimony would not have supported the Respondent's position regarding Eagleson's suspension and termination. *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997).

I do not, in any event, find credible McCluer's and Garrison's testimony that the decision to suspend and terminate Eagleson was made by some unknown person at CHR. Rather, I find it more likely than not, given the Respondent's failure to produce any documentation or witness from CHR to corroborate McCluer's and Garrison's assertion, and the fact that the documents produced relating to Eagleson's suspension and discharge, to wit, RX-7 and RX-9, are signed only by McCluer and Garrison and not by any CHR representative, that the decision to suspend Eagleson on July 11, and to terminate him on July 15, was made by McCluer and/or Garrison, not by some unknown, unidentified individual at CHR. The attempt at the hearing by McCluer, the Respondent's Director of Nursing who has overall supervisory responsibility over nurses and STNAs, and Garrison, the Respondent's principal administrator who has overall management and supervisory at the facility, to depict themselves as virtually powerless to take any disciplinary action against employees, defies logic and common sense, and was not substantiated by documentary or other evidence. Thus, I am convinced that McCluer and/or Garrison were the ones who made the decision to suspend and terminate Eagleson on July 11, and July 15, respectively, and that, for reasons unknown but possibly to avoid personal responsibility, they agreed to shift the focus of responsibility to some unnamed individual at CHR. Their willingness to fabricate this account, along with their lack of credibility in other areas of their testimony, renders their entire testimony suspect and worthy of little or no consideration. In sum, I find their testimony that Eagleson was suspended and subsequently terminated for a poor work performance unworthy of belief.

My rejection of this particular defense is based on another factor. Thus, McCluer readily admitted that the Respondent had no intentions of disciplining Eagleson, much less suspending or firing him, before the July 11, TABS button incident. I am convinced, therefore, that but for the TABS alarm incident, Eagleson would not have been terminated and presumably would still have been in the Respondent's employ at least through July 15. As to the TABS alarm incident, the Respondent's position is that Eagleson, on July 11, failed to place said alarm on resident Palmer despite being told to do so on three separate occasions. The Respondent's investigation of this alleged neglect by Eagleson was anything but fair. Thus, on July 11, CHR, according to McCluer, suspended Eagleson without so much as questioning him about the TABS alarm incident, or seeking his side of the story. Rather, if McCluer can be believed, CHR instead relied solely on Basinger's assertion that she had, on three separate occasions, instructed Eagleson to place an alarm on Palmer.

There were, however, some inconsistencies in Basinger's testimony which casts doubt on its reliability. Basinger's claim, for example, that Schroeder prepared a written statement on her behalf regarding the TABS alarm incident involving Eagleson was not corroborated by Schroeder. Further, her assertion that she gave that written statement to Garrison was not corroborated by Garrison and refuted by McCluer, who testified that she, not Garrison, received Basinger's statement. Nor was Basinger capable of confirming that Eagleson had, in fact, failed on three separate occasions on July 11, to put a TABS alarm on Palmer. Except for the first occasion on the morning of July 11, when she mentioned to Eagleson and Marceen that Palmer needed to have a TABS alarm on her at all times,[31] nothing in Basinger's testimony suggests that she knew for certain that Eagleson had failed on two subsequent occasions to place the alarm on Palmer. Thus, Basinger admitted that she did not know for sure, when she checked resident Palmer a second time and found her in the bathroom without her alarm, that Eagleson had not placed the alarm on Palmer. She further admitted that she never questioned Eagleson on this or the subsequent occasion when Palmer was again found without an alarm on her, if he had failed to place an alarm on Palmer, nor did she bother to ask Palmer herself if she had removed the TABS alarm on her own, as she was prone to doing. Rather, it is patently clear that Basinger simply assumed that Eagleson had been guilty of neglect of duty and reported the matter to McCluer.

McCluer (or CHR if one believes McCluer), as noted, similarly assumed that Eagleson was guilty of neglect and suspended him pending an investigation without first questioning him about, or allowing him an opportunity to respond, to Basinger's allegation. Nor, in fact, in the investigation which followed, and which culminated in the July 15, termination of Eagleson, did McCluer ever ask Eagleson to give his side of the story. Eagleson, as noted, testified that he, in fact, performed his duties properly that day, including placing the alarm on Palmer. Indeed, there is strong evidence to suggest that had McCluer, or for that matter Basinger, bothered to look into the matter more closely, they would have learned of Palmer's propensity to remove the alarm herself, a fact they would have discovered simply by asking Palmer, or even nurse Tucker. The Respondent's failure to give Eagleson an opportunity to defend himself, or to adequately investigate this alleged incident of misconduct by Eagleson, supports an inference that his suspension and eventual discharge were motivated by some other, pretextual reason. *Hospital Espanol Auxilio Mutuo De Puerto Rico, Inc.*, 342 NLRB No. 40 (2004); *Palagonia Bakery Company, Inc.*, 339 NLRB 515, 532 (2003). In sum, the weight of the evidence, including the Respondent's failure to properly investigate the matter, its failure to call as a witness the CHR

[31] As noted, during that first discussion, Marceen agreed to return from her break to Palmer's room to put the alarm on the resident, conduct which Basinger agreed was not improper.

individual or individuals who purportedly made the decision to suspend and discharge Eagleson to explain the decision, and the overall lack of credibility from McCluer and Garrison regarding that decision, leads me to conclude that the reasons given for the action taken against Eagleson, his alleged poor work performance, is nothing more than a pretext, and that the real reason was his Union activity. I am convinced that in suspending and discharging Eagleson, McCluer and Garrison were simply carrying out the plan discussed during their management meetings to rid themselves of Eagleson in the hope that the person they viewed as partially responsible for Union's arrival, Butler, Eagleson's mother, would likewise leave her employment. I therefore find that the Respondent has not demonstrated that it would have suspended Eagleson on July 11, and then terminated him on July 15, even if he had not engaged in Union activities. Accordingly, I further find that Eagleson's July 11, suspension and July 15, termination violated Section 8(a)(1) and (3) of the Act.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By maintaining and enforcing an overly broad dress code policy which prohibits employees from wearing union buttons to work, the Respondent has violated Section 8(a)(1) of the Act.

4. By suspending employees Natalie Butler and Shawn Eagleson under the above-described policy for wearing union buttons to work on April 30, 2003, the Respondent has violated Section 8(a)(1) and (3) of the Act.

5. By issuing Shawn Eagleson a final written warning on May 20, because of his union activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

6. By placing employee Arlene Okuley on a 30-day work improvement plan on May 21, 2003, in retaliation for her Union activities, the Respondent has violated Section 8(a)(3) and (1) of the Act.

7. By issuing a warning to, and suspending, Shawn Eagleson on July 11, 2003, and thereafter discharging him on July 15, for his Union activities or to discourage other employees from doing so, the Respondent has violated Section 8(a)(3) and (1) of the Act.

8. The Respondent's above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

To remedy its unlawful April 30, 2003, one-day suspension of Natalie Butler and Shawn Eagleson, the Respondent shall be required to make them whole for any loss of earnings and other benefits they may have suffered, in the manner prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

As to the unlawful July 11, 2003 suspension and subsequent July 15, 2003 discharge of Eagleson, the Respondent shall be ordered to, within 14 days from the date of the Order, offer Eagleson reinstatement to his former position or to a substantially equivalent position if his former position no longer exists, without prejudice to his seniority or other rights and privileges he previously enjoyed. The Respondent will also be required to make him whole for any loss of earnings and benefits Eagleson may have suffered as a result of his unlawful suspension and termination, in the manner described in *F. Woolworth Co.*, supra, with interest on such amounts to be computed in accordance with *New Horizons for the Retarded*, supra.

Finally, the Respondent shall be required to, within 14 days from the date of the Order, remove from its files any and all reference to the unlawful April 30, 2003 suspension of Butler and Eagleson, to the unlawful work improvement plan issued to Okuley on May 21, 2003, to the unlawful May 20, 2003, warning issued to Eagleson, and to the July 11, 2003 suspension, and July 15, 2003, discharge of Eagleson, and to, within 3 days thereafter, notify them in writing that this has been done and that the above-described unlawful actions will not be used against them in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[32]

ORDER

The Respondent, THI of Columbus, Inc., d/b/a Autumn Court, Omaha, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and giving effect to the provision in its dress code policy prohibiting employees from wearing union buttons at work.

(b) Suspending Natalie Butler, Shawn Eagleson or any other employee for wearing union buttons to work in order to discourage employee support for the Union.

(c) Issuing a 30-day work improvement plan to Arlene Okuley or any other employee for engaging in union activity or to discourage other employees from engaging in such activity.

(d) Issuing warnings to, suspending, and discharging Shawn Eagleson or any other employee for engaging in union activity or in order to discourage employees from engaging in such activity.

[32] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Order, offer Shawn Eagleson reinstatement to his position or, if said position no longer exists, to a substantially equivalent position without prejudice to the seniority and other rights and privileges he previously enjoyed.

(b) Make Shawn Eagleson and Natalie Butler whole for any loss of pay or other benefits they may have suffered as a result of their unlawful April 30, suspension, and make Shawn Eagleson whole for his unlawful July 11, suspension and July 15, discharge from employment, with interest, as described in the "Remedy" section of this decision.

(c) Within 14 days from the date of the Order, rescind and remove from its files any and all references to the April 30, suspension of Shawn Eagleson and Natalie Butler, the 30-day work improvement plan issued to Arlene Okuley on May 21, the May 20, warning issued to Eagleson, and to the July 11 suspension and July 15, termination of, Shawn Eagleson and, within three days thereafter, notify them in writing that this has been done and that these unlawful actions will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Ottawa, Ohio, copies of the attached Notice marked "Appendix."[33] Copies of the Notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these

[33] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by the Respondent at any time since April 30, 2003.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

_____
George Alemán
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT enforce or give effect to the provision in our dress code policy which prohibits employees from wearing union buttons or other insignia on their uniforms at work.

WE WILL NOT suspend or otherwise discipline employees for refusing to remove union buttons from their uniforms.

WE WILL NOT retaliate against employees who engage in union activity by placing them on 30-day work improvement plans.

WE WILL NOT issue warnings to, suspend, and/or terminate employees for engaging in union activities or to discourage other employees from engaging in such activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's order, offer Shawn Eagleson immediate and full reinstatement to his former position or, if his position no longer exists, to a substantially equivalent position without prejudice to the rights and privileges he previously enjoyed.

WE WILL make Shawn Eagleson and Natalie Butler whole for any loss of pay and other benefits resulting from their unlawful one-day suspension on April 30, 2003, and for Shawn Eagleson's unlawful July 11, 2003 suspension and July 15, 2003, discharge, with interest.

WE WILL, within 14 days from the date of the Board's order, rescind and remove from our files any and all references to the April 30, 2003, suspension of Shawn Eagleson and Natalie Butler, the May 20, 2003, final written warning issued to Shawn Eagleson, the May 21, 2003, 30-day work improvement plan issued to Arlene Okuley, and the July 11, 2003, warning and suspension, and July 15, 2003, termination of Shawn Eagleson, and, within three days thereafter, **WE WILL** notify them in writing that we have done so and that our unlawful actions will not be used against them in any way.

THI OF COLUMBUS, INC., d/b/a AUTUMN COURT

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1240 East 9th Street, Federal Building, Room 1695, Cleveland, OH 44199-2086

(216) 522-3716, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (216) 522-3723.